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IN THE

Supreme Court of The United States

OCTOBER TERM, 1973

NO. 73-725

STATE OF INDIANA, ON THE RELATION AND FOR THE USE OF CONCORD COMMUNITY SCHOOLS, ELKHART COUNTY, INDIANA,
Petitioner,

vs.

SCHOOL CITY OF ELKHART, INDIANA: THOMAS BLACKBURN, as President and Trustee of School City of Elkhart, Indiana; MARION SHELLEY, as Vice-President and Trustee of School City of Elkhart, Indiana; JOHN BURT, as Secretary and Trustee of School City of Elkhart, Indiana; RALPH MILLER, as Treasurer and Trustee of School City of Elkhart, Indiana; PHILIP BYRON, as Trustee of School City of Elkhart, Indiana; JOE C. RICE, as Superintendent of School City of Elkhart, Indiana; CLARE F. GARBER, as Auditor of Elkhart County, Indiana; EVERETT L. DANIELSON, as Treasurer of Elkhart County, Indiana; CLEVELAND SCHOOL TOWNSHIP; OSOLO SCHOOL TOWNSHIP; WASHINGTON SCHOOL TOWNSHIP; ELKHART COMMUNITY SCHOOLS; LOUIS B. MILLER, ROBERT BOGER, ELWOOD BRANNAN, RICHARD DOUTLICK, NELSON C. EATON, CHARLES FIELDS, LA VERN HOSTETLER, ORVILLE MILLER, CLIFFORD SMITH, as members of and constituting the Elkhart County School Reorganization Committee; CUSTER BAKER, CHESTER BIDDLE, J. WILLIAM CHAMBERS, JOHN J. DILLON, AMELIA COOK, DICK HELLER, JR., HERBERT C. HOLMES, WILLIAM E. WILSON, BRYCE BOTTOM, as members of and constituting the Indiana State Commission for the Reorganization of School Corporations,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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IN THE

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NO. _____

STATE OF INDIANA, ON THE RELATION AND FOR THE USE OF CONCORD COMMUNITY SCHOOLS, ELKHART COUNTY, INDIANA,
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vs.

SCHOOL CITY OF ELKHART, INDIANA; THOMAS BLACKBURN, as President and Trustee of School City of Elkhart, Indiana; MARION SHELLEY, as Vice-President and Trustee of School City of Elkhart, Indiana; JOHN BURT, as Secretary and Trustee of School City of Elkhart, Indiana; RALPH MILLER, as Treasurer and Trustee of School City of Elkhart, Indiana; PHILIP BYRON, as Trustee of School City of Elkhart, Indiana; JOE C. RICE, as Superintendent of School City of Elkhart, Indiana; CLARE F. GARBER, as Auditor of Elkhart County, Indiana; EVERETT L. DANIELSON, as Treasurer of Elkhart County, Indiana; CLEVELAND SCHOOL TOWNSHIP; OSOLO SCHOOL TOWNSHIP; WASHINGTON SCHOOL TOWNSHIP; ELKHART COMMUNITY SCHOOLS; LOUIS B. MILLER, ROBERT BOGER, ELWOOD BRANNAN, RICHARD DOUTLICK, NELSON C. EATON, CHARLES FIELDS, LA VERN HOSTETLER, ORVILLE MILLER, CLIFFORD SMITH, as members of and constituting the Elkhart County School Reorganization Committee; CUSTER BAKER, CHESTER BIDDLE, J. WILLIAM CHAMBERS, JOHN J. DILLON, AMELIA COOK, DICK HELLER, JR., HERBERT C. HOLMES, WILLIAM E. WILSON, BRYCE BOTTOM, as members of and constituting the Indiana State Commission for the Reorganization of School Corporations,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

Petitioner respectfully prays that a writ of certiorari issue to review the final decree of the Supreme Court of the State of Indiana entered herein on August 6, 1973, denying transfer of this cause and thereby affirming the decision of the Indiana Court of Appeals (3rd Div.) in

this cause dated January 30, 1973, rehearing denied March 1, 1973.

OPINION BELOW

The decree of the court below was not accompanied by a written majority opinion. The decree and a dissenting opinion of the Indiana Supreme Court are reported in 299 N.E. 2d 829. Prior reported decisions in this cause are *School City of Elkhart et al. v. State ex rel. Concord Community Schools, Elkhart County, Indiana, et al.* (June 20, 1967), 248 Ind. 511, 227 N.E. 2d 672, rehearing denied, October 6, 1967, 248 Ind. 511, 229 N.E. 2d 824; (January 30, 1973, Indiana Court of Appeals), 291 N.E. 2d 715, rehearing denied March 1, 1973. Opinions in a connected case are reported in *Concord Community Schools et al. v. State ex rel. Elkhart Community Schools, et al.* (April 22, 1970, Appellate Court of Indiana, Division 1), 257 N.E. 2d 338, rehearing denied May 21, 1970; (July 20, 1971, Supreme Court of Indiana), 271 N.E. 2d 468. All said reported opinions are printed in Appendix A of this petition.

JURISDICTION

The decree of the Supreme Court of Indiana denying transfer to that Court was dated and entered on August 6, 1973. No request for rehearing of such judgment is allowed under the Indiana Rules of Appellate Procedure, Rule 11, as amended, and none was made. No extension of time within which to petition for certiorari has been requested. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. § 1257 and the Fourteenth Amendment to the Constitution of the United States.

The relevant portion of 28 U.S.C. § 1257 reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision may be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> "(3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of the United States."

QUESTIONS PRESENTED

1. May the Supreme Court of Indiana, illegally sitting as a trial court, decide a declaratory judgment action on its merits, on a theory not offered or argued by the parties and on which a hearing had not been held and no evidence presented and thereby foreclose the right of Concord Community Schools, its residents, voters and taxpayers, to a hearing on the merits guaranteed by the due process provisions of the Fourteenth Amendment to the United States Constitution?

2. May the Supreme Court of Indiana deprive Concord Community Schools, its residents, voters, and taxpayers of procedural due process notice of administrative and court hearings and voting required by Indiana law, on a record devoid of evidence that such procedures had been followed?

3. Did the Indiana Supreme Court violate the right of Concord Community Schools, its residents, voters and taxpayers to due process of law when it transferred from Concord territory and tax base annexed by the City of Elkhart after the procedural steps which should have been taken by Elkhart Community Schools to accomplish such a transfer had been completed?

4. Did the action of the Supreme Court of Indiana in depriving Concord Community Schools and its taxpayers of the revenues from areas annexed by the Civil City of Elkhart, Indiana without notice and hearing and without the proration of previously incurred liabilities Indiana law required, deprive Concord and its taxpayers of their property without due process of law?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 14 to the United States Constitution reads in pertinent part as follows:

> "No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATUTORY PROVISIONS INVOLVED

The Indiana statute involved is "The School Corporation Reorganization Act of 1959," Ind. Acts of 1959, ch. 202, IC 1971 20-4-1, Burn's Ind. Stat. Ann. 1970 Replacement §§ 28-3501 *et seq.* The relevant sections are set forth in Appendix B to this petition.

STATEMENT OF THE CASE

Petitioner is the State of Indiana on the relation and for the use of Concord Community Schools, Elkhart County, (hereinafter referred to as "Concord") an Indiana school corporation and body politic. This is an action for injunction and for declaratory judgment to declare the rights of Concord and the respondent Elkhart Community Schools, Elkhart County (hereinafter referred to as "Elkhart"), an Indiana school corporation and body politic, as to four specified tracts of territory annexed

by the Civil City of Elkhart and claimed by Elkhart to be included in its school territory.

In 1959, by the adoption of Ind. Acts of 1959, ch. 202, the School Corporation Reorganization Act of 1959 (hereinafter referred to as "the 1959 Act"), the Indiana General Assembly mandated school reorganization in Indiana. Pursuant to the 1959 Act, a Comprehensive Plan for Elkhart County, Indiana, was developed including Concord with boundaries described as all of Concord Township outside the Civil City of Elkhart. Concord began its existence on July 1, 1964. The Plan proposed for Elkhart Community Schools was voted down in May and November of 1964. The proposed district for Elkhart was Elkhart School City, Cleveland School Township, Osolo School Township and Washington School Township. The boundaries set forth were Cleveland Township, Osolo Township, Washington Township and the Civil City of Elkhart combined as one unit.

On March 23, 1966, the identical plan for the Elkhart Community Schools was again proposed by the County Committee for the Reorganization of Schools of Elkhart County formed under the 1959 Act to the Indiana State Commission for the Reorganization of School Corporations created under the 1959 Act. The State Commission approved the plan on March 31, 1966, and the plan received a favorable vote at the primary election of May 3, 1966.

On each of the dates January 17, February 7 and 26 and May 16, 1966, the Common Council of the City of Elkhart enacted an annexation ordinance which annexed territory to the civil city which was, as of July 1, 1964, included in the territory of Concord School Corporation. Thereafter, Concord contended that the annexed territories remained with it for school purposes until a 1963 Indiana Act requir-

ing Concord's consent was complied with, while Elkhart contended that upon annexation, the annexed territories were automatically within its jurisdiction for school tax and pupil attendance and other school purposes pursuant to a 1957 Indiana Act. The respondent Elkhart County Treasurer and Auditor intended, unless restrained, to treat the annexed areas for tax purposes as part of Elkhart. This action for equitable relief and declaratory judgment followed, instituted by Concord.

The trial court, the Elkhart Circuit Court, held a hearing on whether a temporary injunction should issue. On July 29, 1966, the trial court entered a temporary injunction enjoining Elkhart and all other respondents from treating the annexed territories as a part of Elkhart school corporation for school and school tax purposes until the final hearing of the cause and the further order of the court. That decision was appealed by Elkhart to the Supreme Court of Indiana.

From the filing of the original complaint and through the briefing and argument and petition for rehearing in the Supreme Court of Indiana, Elkhart contended that the annexed areas automatically became a part of Elkhart's territory immediately upon annexation pursuant to Ind. Acts 1957, ch. 112, §§ 1-5, 1971 IC 20-4-16-1 through 5, Burns Ind. Stat. Ann. §§ 28-3626—28-3630. Concord, on the other hand, contended that Ind. Acts of 1963, ch. 296, IC 1971, 20-4-4-1 through 9, Burns §§ 28-3601—28-3609, was controlling. The 1963 Act required consent of both school corporations for transfer of territory. Stipulations showed that prerequisites of the 1963 Act to a change in territory had not been met. The 1957 Act did not require notices as to a change in school territory.

The Supreme Court of Indiana decided the case on an entirely new theory, that the 1959 Act applied.

The 1959 Act requires that: the preliminary and final school plans describe the boundaries of the proposed school corporation, give the disposition of the assets and liabilities if a school corporation is to be divided and the disposition of school aid bonds, if any, plus the assessed valuation, and assessed valuation per pupil, average daily attendance and property tax levies of each existing affected school corporation, § 5 (4), Burns § 28-3507 (b), (f) and (g); the county school committee must give notice of hearing on a school plan to all residents of school corporations affected and requires a hearing to be held, at which the county committee states the proposed adjustment of assets and liabilities if a school corporation is to be divided, § 5 (5) as amended, Burns § 28-3509 and § 5 (8), Burns § 28-3512; notice of public hearing must be given and hearing held in the county before the State Commission, § 6 (3), Burns § 28-3517 (e); notice of an election must be given to the registered voters residing within the boundaries of the proposed corporation, § 7 (2), Burns § 28-3529; the plan must be accepted or rejected by the registered voters residing within the boundaries of the proposed corporation, § 7 (2), Burns § 28-3520; a statement must be made in the legal notice of the election of the proposed terms of adjustment of property, assets, debts and liabilities of existing school corporations to be divided, § 7 (2), Burns § 28-3520; appeals are allowed by aggrieved persons to the State Commission from a decision of the county committee, and from the State Commission to the Courts within thirty (30) days after a decision of the State Commission, § 8, Burns § 28-3518. [The relevant texts of the 1959 Act are set out in full in Appendix B *infra*.]

Prior to the decision of the Supreme Court of Indiana, no hearing had been held or argument made that the 1959 Act notice and hearing due process requirements had been complied with. There was no evidence in the record to show that said procedures had been followed as to Concord, its registered voters, residents and taxpayers. The plan itself was in the record as Exhibit 4 to Plaintiff's Exhibit 2, (R. pp. 323-329), and comparison with the 1966 plan (R. pp. 271-320) which admittedly did not include Concord territory, shows them to be identical. Legal notices of hearings and election were at that time not in the record of the cause. As brought into the record later, they were shown not to refer in any way to Concord, its assets, debts, liabilities, residents, taxpayers or territory. The assessed valuation specified in the plan was the same as Elkhart's as of the 1964 proposed plan. Nevertheless the Supreme Court of Indiana decided:

> "The procedures required [by 1959 Act] were strictly followed and after approval by the State Commission of the County Committee's said proposal, the matter was submitted as required to the electorate of the territory involved in the proposal, which received an affirmative vote.
>
> • • •
>
> "The judgment herein rendered by the trial court is hereby reversed, with instructions to dissolve the temporary injunction, and the court is hereby ordered to enter a finding and judgment for the Appellants, defendants below, in accordance with the tenor hereof, both on the equity and the law questions presented." 227 N.E. 2d at 674-5.

Concord petitioned for rehearing. The opinion of the Supreme Court of Indiana denying rehearing reads as follows:

"In its Petition for Rehearing, the Appellee, Concord Community Schools, is critical of what does appear to be an erroneous statement of one fact. Annexation Ordinance #2145 was indeed enacted on May 16, 1966 and the last publication thereon was on May 31, 1966. The County Committee approved the plan for the creation of Elkhart Community Schools as of May 23, 1966, the State Commission approved it on March 31, 1966 and the same was voted on, together with other annexation ordinances, on May 3, 1966.

"When this cause was submitted, both parties, in their briefs and at the oral argument requested that this Court decide the basic issue involved. This Court did so and we do not regard Appellee's complaint as either well founded or justified in view of its own request.

"We stated that The School Corporation Reorganization Act of 1959, ch. 202, p. 451 et seq., was our primary guide at arriving at our decision. The opinion speaks for itself and ample language is contained therein to decide the questions presented upon reversal.

"Appellee's Petition for Oral Argument on the Petition for Rehearing is denied; the Petition for Rehearing is Denied." 229 N.E. 2d 824, 825.

Concord filed a Motion to Modify Mandate of the Court on November 16, 1967. Said Motion is lengthy and is reproduced in full in Appendix C to this Petition. (R. pp. 171-184) In said Motion, Concord requested the Supreme Court of Indiana to remand the cause to the trial court for reshaping and reforming the issues for trial under the 1959 Act, so that "the ends of justice will be best served" for the reasons that (1) the 1966 Elkhart plan did not show an intention to give Concord territory to Elkhart because it did not comply with the procedural due process notice,

hearing and voting and disposition of property requirements of the 1959 Act previously set out herein, (2) excerpts from minutes of meetings of the Indiana State Commission for the Reorganization of School Corporations on June 7, 1966 and November 2, 1966 demonstrate that the said State Commission intended to approve the incorporation only of the School City of Elkhart as of July 1, 1964 within Elkhart, and did not intend by approving the Elkhart plan to change the boundaries of Concord as they existed on July 1, 1964, and that if the said State Commission had intended to alter the territorial boundaries of Concord to include the annexed territory within Elkhart, it would have required that the Elkhart plan include provisions for the pro rata assumption of liabilities and indebtedness of Concord by Elkhart as mandated by the 1959 statute; (3) Concord and its taxpayers were indebted in amounts of approximately two million four hundred eighty-six thousand dollars ($2,486,000.00) plus an annual obligation of one hundred forty thousand dollars ($140,000.00) per year, all debts and liabilities incurred on the tax base which included the annexed territories; (4) an affidavit was attached showing that the registered voters in the annexed territory had not been allowed to vote on the Elkhart Plan. The legal notice of election on the Elkhart Plan and the plan itself were set out in the said Motion.

Concord and Elkhart had agreed, on June 7, 1966, that Elkhart, as the defendants

> "do not now, nor will they, or any of them, at any stage of this litigation, contend that the plaintiff does not have the legal right to challenge the validity of Elkhart Community Schools to the extent that such plan purports or may purport to bring within the boundaries of School City, or within the boundaries of Elkhart Community Schools after July 1, 1966, the

> **Annexed Territories, without challenging the validity of Elkhart Community Schools or such plan in toto: that this joint agreement may be filed by any party hereto at any stage of these proceedings, or without filing may be referred to either by written brief, orally or otherwise, at any stage of this proceeding."**

(This Joint Agreement was placed of record by Elkhart as Exhibit A to its Motion to Dismiss Concord's Petition to Modify Mandate to the Supreme Court.)

Concord's Motion to Modify Mandate of the Court was dismissed without comment by the Supreme Court on the 22nd day of November, 1967:

> "Motion of Appellants to Dismiss Petition by Appellee to Modify Mandate to the Trial Court is hereby sustained this 22nd day of November, 1967." (R. p. 194)

On November 17, 1967, Concord filed with the trial court a Motion for Leave to Amend Complaint, which motion is reproduced in Appendix D hereto. (R. pp. 168-184) Said Motion to Amend requested leave to add a new paragraph to the complaint alleging that the Elkhart Plan was not intended to remove territory from Concord and that due process notice and voting and division of liabilities required by the 1959 Act had not been complied with. As a memorandum to its Motion, Concord attached its Motion to Modify Mandate filed in the Supreme Court of Indiana. Concord on the same day requested a hearing and that evidence be heard on its complaint for declaratory judgment (R. pp. 186-187), alleging that:

> "The court has not heard evidence and has made no finding and has not declared the rights of the parties under the relief prayed for for declaratory judgment. . . . It would be unfair to the court and to the parties not to have a hearing and trial on the

> merits of the relief prayed for in the complaint for declaratory judgment under these circumstances. . . ." (R. pp. 186-187) [Set out in full in Appendix E, *infra*).

The trial court overruled Concord's Motion to Amend and Motion for a Hearing:

> "The Court after due consideration, now overrules and denies said motions." (R. p. 189, ll. 1-2)

This decision necessarily decided the constitutional due process questions raised by Concord.

On November 21, 1967, the trial court, without a hearing, entered judgment on the merits for Elkhart, declaring that all four annexed territories became a part of Elkhart for all school and tax purposes. (R. pp. 190-191, Appendix F, *infra.*)

On November 29, 1967, Concord moved to modify the trial court's judgment, as set out in full in Appendix G herein. (R. pp. 196-202) The grounds were that the judgment of the trial court did not conform to the Indiana Supreme Court's opinion as to Annexation Ordinance No. 2145, enacted after the Elkhart plan was voted on, that there was no finding by the court to support its judgment, and that the Supreme Court of Indiana intended that the lower court should apply the 1959 Act to the facts of the case in arriving at its decision. Said motion was overruled December 5, 1967:

> "The motion of the Plaintiff to modify the judgment which was heretofore filed herein is now by the Court overruled." (R. p. 203)

On December 19, 1967, Concord filed its Motion for a New Trial and Memorandum thereto (R. pp. 205-218) (printed in full Appendix H, *infra*), assigning as error

the trial court's denial of Concord's Motion for Leave to Amend its Complaint to raise due process questions under the 1959 Act, denial of Concord's motion for a hearing in that Concord had never been afforded a hearing on the facts after the time the Supreme Court decided that the 1959 Act applied, denial of Concord's motion to modify the trial court's judgment, and that the decision of the trial court was contrary to law and not sustained by sufficient evidence in that there was no evidence in the record to show that the notice and voting and property disposition due process requirements of the 1959 Act as to Concord itself, its residents, taxpayers and voters, had been complied with, and that the evidence and Supreme Court opinion showed that one of the annexed territories had been annexed after the plan had been voted on. A recent decision of the Indiana Appellate Court, *Duda v. New Prairie United School Corporation* (1967), 140 Ind. App. 528, 224 N.E. 2d 327, was called to the Court's attention. It held that territory annexed by a civil city does not automatically become a part of a school corporation which includes other territory in addition to the civil city.

The Elkhart Circuit Court overruled Concord's Motion for a New Trial:

> "The Court now overrules Plaintiff's motion for a new trial." (R. p. 229)

Concord appealed, assigning as error the trial court's overruling of Concord's Motion for a New Trial. (Appendix I, R. pp. 1-2) The grounds raised in the Appellant's Brief were that the trial court's judgment that the Supreme Court has decided the merits of the cause in its first decision was contrary to law in that the Supreme Court of Indiana was without constitutional and statutory jurisdiction under Indiana law to decide a case as though

it had original jurisdiction, and that the failure of notice, hearings, elections and property disposition required by the 1959 Act violated the due process portion of the 14th Amendment to the United States Constitution.

The Indiana Court of Appeals, Division 3, dismissed the appeal on March 1, 1973, with a written opinion found at 219 N.E. 2d 715. (Appendix A *infra.)* The gist of the opinion is that the Supreme Court of Indiana decided the action for declaratory judgment on its merits in its decision in the first appeal. Rehearing was denied March 1, 1973. The Court of Appeals' decision was based in part upon a decision of the Supreme Court of Indiana in a prior case. There, Elkhart had filed a declaratory judgment action to determine the validity of a plan filed for Concord and approved by the Indiana State Commission for the Reorganization of School Corporations effective July 1, 1968 to place within Concord territory the annexed territories here in dispute. The trial court held in Elkhart's favor, the Court of Appeals reversed, (1970), 257 N.E. 2d 338, and the Supreme Court of Indiana reversed the Court of Appeals and affirmed the judgment of the trial court. (1971), 271 N.E. 2d 468. (Both of those opinions are set out in full in Appendix A *infra.*)

Concord petitioned the Supreme Court of Indiana for transfer, alleging again that Concord was deprived of due process of law guaranteed by the 14th Amendment to the United States Constitution. (Appendix J, *infra.*) On August 6, 1973, transfer was denied. (Appendix A, *infra.*)

REASONS FOR GRANTING THE WRIT

If this Court does not issue a writ of certiorari in this cause, the Supreme Court of Indiana, sitting without legal authority as a trial court, will successfully deprive Con-

cord and its residents, voters and taxpayers, of their constitutional rights to a hearing on the question of whether they obtained due process of law guaranteed by a 1959 Indiana statute and the Fourteenth Amendment to the United States Constitution.

This case was filed as a suit for a declaratory judgment as to the people of Concord's rights under 1963 and 1957 Indiana statutes. A hearing on a temporary injunction was held, with evidence presented as to the 1963 and 1957 Acts. On appeal, the Supreme Court of Indiana decided the declaratory judgment action on the merits under a 1959 Act. *No hearing for affected parties has ever been held to determine the facts to which the 1959 Act was applied by the Supreme Court of Indiana*, contrary to this court's interpretation of the due process provision of the Fourteenth Amendment to the United States Constitution, *Fuentes* v. *Shevin* (1972), 407 U.S. 67, 80, 32 L. ed. 2d 556, 569, 92 S. Ct. 1938. A "full hearing" means:

> "that every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. . . . Such a hearing is essential for a wise and just application of the authority of administrative board and agencies." *U.S.* v. *Storer* (1956), 351 U.S. 192, 202, 100 L ed. 1081, 76 S. Ct. 763.

Although the Indiana Supreme Court in its opinion on the first appeal of this cause held that the procedural requirements of the 1959 Act had been followed by the county and state administrative agencies involved, and that it therein decided the case on the merits, its statement in the opinion on the rehearing of the cause on the first appeal that "The opinion speaks for itself and ample language is contained therein to decide the questions pre-

sented in reversal," plus its admission that it had made an error of fact as to the time at which the fourth territory was annexed, could easily be interpreted to require the trial court to apply the 1959 Act to the facts presented by the parties on reversal. This interpretation was not necessarily foreclosed by the Indiana Supreme Court's dismissal of Concord's Motion to Modify Mandate. When, however, the trial court refused to allow Concord to amend its complaint to raise procedural due process questions under the 1959 Act and the Fourteenth Amendment and entered judgment on the basis of the Indiana Supreme Court's opinion, the United States constitutional question of the people of Concord's right to a hearing was necessarily decided. The trial court's ruling was upheld by the Indiana Court of Appeals on the basis of the Indiana Supreme Court's opinion in the first appeal and in the case of *Concord Community Schools et al.* v. *State ex rel. Elkhart Community Schools, et al.*, 271 N.E. 2d 468. (Appendix A, *infra.*) The Indiana Supreme Court's refusal to transfer the cause to consider the constitutional issue effectively foreclosed a hearing in Indiana courts for the people of Concord on their constitutional rights. The effect was that the Indiana Supreme Court did decide the case on its merits on the first appeal, sitting as a court of original decision, as to a statute and facts not presented or argued by the parties. That decision violated a long line of decisions by the Supreme Court of Indiana which held that under the Indiana Constitution, Article 7, § 4, as it then existed, the Indiana Supreme Court had no jurisdiction in declaratory judgment actions, *Spence* v. *State* (1943), 221 Ind. 474, 48 N.E. 2d 459; *Danker* v. *State* (1956), 236 Ind. 696, 138 N.E. 2d 900. The court had also consistently held that consent of the parties could not confer jurisdiction not given by law, *Branson* v. *Stude-*

baker (1892), 133 Ind. 147, 33 N.E. 98; *Smith* v. *Myers* (1886) 109 Ind. 1, 9 N.E. 692; *Davis* v. *Davis* (1871), 36 Ind. 160. The federal right to a full hearing before facts are decided thus was denied by the Supreme Court of Indiana's violation of a procedural rule, which was not expressly overruled therein, has not been overruled since, and the operation of which in this cause could not have been foreseen by Concord. Such a violation of the people of Concord's right to due process by the state judiciary is as clear as when accomplished by the legislature and will be redressed by this Court, *Bouie* v. *Columbia* (1964), 378 U.S. 347, 354-355, 112 L. ed. 2d 894, 900, 84 S. Ct. 1697. When the act complained of is the act of the Supreme Court of the state done unexpectedly, and the same court thereafter decided that the people of Concord no longer had any right to a hearing or to add to the record, it is a case for this Court to decide. *Saunders* v. *Shaw* (1917), 244 U.S. 317, 61 L. ed. 1163, 37 S. Ct. 638; in accord, *Missouri ex rel. Missouri Insurance Co.* v. *Gehner* (1930), 281 U.S. 313, 74 L. ed. 870, 50 S. Ct. 326.

The decision below should be reviewed because Concord, its residents, taxpayers, parents of school children and voters in the annexed territories, have been deprived by the Indiana Supreme Court of notice of the transfer of territory in the administrative hearings required as procedural steps in the annexation of Concord's territory under the 1959 Act. Registered voters in the annexed territory were also deprived of their right to vote on the Elkhart Plan. There is no question presented here concerning the constitutional validity of the 1959 Act. It requires the above procedural notices and voting. Under Indiana law, such procedural requirements concerning the formation of school corporations must be strictly followed, and no court is entitled to ignore or vary such procedure.

Persons affected by a change in a school corporation have a right to require that the procedures be followed. *State ex rel. Jones* v. *Johnson Circuit Court* (1962), 243 Ind. 7, 12, 181 N.E. 2d 857, 860; *Wright* v. *Kinnard* (1969), 144 Ind. App. 286, 245 N.E. 2d 835. The United States Constitution also requires that parties be given procedural due process granted by law in administrative proceedings, *U.S.* v. *Storer* (1956) 351 U.S. 192, 202, 100 L. ed. 1081, 76 S. Ct. 763.

The Supreme Court of Indiana, in its opinion in the first appeal of this cause, decided that the procedures under the 1959 Act had been followed on a record devoid of evidence that such procedures had been followed as to Concord and its taxpayers and residents and the voters in the annexed territories. The record did affirmatively show at that time that the Elkhart plan itself failed to mention Concord, its tax payers, voters and residents. Listing of Concord territory to be transferred was required by the 1959 Act were Concord to be affected, and the plan was required to specify the disposition of assets and liabilities between Concord and Elkhart. The record shows the plan did not. If any resident of Concord, including the annexed territories, had read the plan and the notices given thereunder, none could have guessed that the annexed territories were to be included within Elkhart. There was no notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the transfer, as required by the Fourteenth Amendment as interpreted by this Court, *Schroeder* v. *City of New York* (1962), 371 U.S. 208, 211 L. ed 2d 255, 258, 83 S. Ct. 279. In its motion to Modify Mandate of the Indiana Supreme Court on the first appeal, also attached and incorporated into Concord's Motion for Leave to Amend Complaint, Concord showed that voters in the

annexed territories had not been given notice of the election as required by the 1959 law, and that voters in the annexed territories were not allowed to vote on the Elkhart plan as required by the 1959 Act. Concord further showed therein that the Indiana State Commission on the Reorganization of Schools had not intended to and did not realize it was transfering Concord territory to Elkhart by approving the Elkhart plan. This intention was further demonstrated by the State Commission's subsequent action in approving a 1968 Concord plan specifically placing the annexed territories in Concord, which the Indiana Supreme Court reversed as an attempt to overrule the Indiana Supreme Court's decision in the first appeal of this cause. 271 N.E. 2d 468 (See Appendix A, *infra.*)

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' " *Fuentes* v. *Shevin* (1972), 407 U.S. 67, 80, 32 L. ed. 2d 556, 569, 92 S. Ct. 1983.

The Supreme Court of Indiana, by declining transfer in the second appeal, decided that Concord had received due process under the 1959 Act on the record presented to it in the first appeal, and thereby effectively denied notice to Concord, its residents, taxpayers and voters.

The most outrageous result of the decisions of the Indiana Supreme Court in this cause is the fact that the territory annexed by Annexation Ordinance No. 2145, the fourth ordinance, is thereby included in Elkhart. The Indiana Supreme Court admitted in its opinion on rehearing in the first appeal that, in its original opinion, there

> "does appear to be an erroneous statement of one fact. Annexation Ordinance #2145 was indeed enacted on May 16, 1966 and the last publication thereon was

> on May 31, 1966. The County Committee approved the plan for the creation of Elkhart Community Schools as of May 23, 1966, the State Commission approved it on March 31, 1966 and the same was voted on, together with other annexation ordinances, on May 3, 1966." 229 N.E. 2d 824.

The ordinance was enacted on May 16, 1966, after all of the "procedures" required by the 1959 Act and ending in the vote on May 3, 1966 should have been completed. Obviously, there was no way that notice could have been given to Concord, its taxpayers, residents and voters, and hearing had as to the territory involved in Ordinance No. 2145. The Supreme Court of Indiana thereby deprived Concord, its taxpayers, voters and residents, of due process of law.

The Indiana Supreme Court further has deprived Concord and its taxpayers of property without due process of law. Concord and its taxpayers remain financially responsible for Concord's bonds and other legally binding financial liabilities previously issued on the basis of including the annexed territory in its tax base. The Elkhart plan did not contain provisions for any division of assets and liabilities of Concord, contrary to the 1959 Act. The Indiana State Commission for the Reorganization of Schools would not have approved the Elkhart plan without provision for the payment by Elkhart of Concord's bonds and liabilities attributable to the tax base annexed by the city of Elkhart as required by the 1959 Act, had it had any reason to believe or know that such territories were included in the Elkhart plan. The judicial fiat of the Supreme Court of Indiana in refusing to allow a hearing on this issue deprived Concord and its taxpayers of their property without just compensation, contrary to the Fourteenth Amendment to the United States Constitution. No

such issue was presented or raised in this cause prior to the trial court's interpretation of the Indiana Supreme Court's opinion on the first appeal. Under such circumstances, this Court will take the cause to redress the wrong, *Baltimore & Ohio Ry. Co.* v. *United States* (1936), 298 U.S. 349, 362-363, 80 L. ed. 1209, 1220, 56 S. Ct. 797.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

OPINIONS BELOW

SUPREME COURT OF INDIANA

STATE OF INDIANA, ON THE RELATION) AND FOR THE USE OF CONCORD COM-) MUNITY SCHOOLS, ELKHART COUNTY,) INDIANA, *Appellant*)

vs.

SCHOOL CITY OF ELKHART, INDIANA,) THOMAS BLACKBURN, as President and Trus-) tee of School City of Elkhart, Indiana, MARION) SHELLEY, as Vice-President and Trustee of) School City of Elkhart, Indiana, JOHN BURT,) as Secretary and Trustee of School City of Elk-) hart, Indiana, RALPH MILLER, as Treasurer) and Trustee of School City of Elkhart, Indiana,) PHILLIP BYRON, as Trustee of School City of) Elkhart, Indiana, JOE C. RICE, as Superintend-) ent of School City of Elkhart, Indiana,) CITY OF ELKHART, INDIANA,) CAUSE CLARE F. GARBER, as Auditor of Elkhart) NO. County, Indiana, EVERETT L. DANIELSON, as) 31034 Treasurer of Elkhart County, Indiana, LEWIS) B. MILLER, ROBERT BOGER, ELWOOD) BRANNON, RICHARD DOUTLICK, NELSON) C. EATON, CHARLES FIELDS, LA VERN) HOSTETLER, ORVILLE MILLER, CLIF-) FORD SMITH, as Members of and Constituting) the Elkhart County School Reorganization) Committee.)
CUSTER BAKER, CHESTER BIDDLE, J.) WILLIAM CHAMBERS, JOHN J. DILLON,) AMELIA COOK, DICK HELLER, JR., HER-) BERT C. HOLMES, WILLIAM E. WILSON,) BRYCE BOTTOM, as Members of and Constitut-) ing the Indiana State Commission for the Re-) organization of School Corporations,)
CLEVELAND SCHOOL TOWNSHIP, OSOLO) SCHOOL TOWNSHIP, WASHINGTON) SCHOOL TOWNSHIP, ELKHART COM-) MUNITY SCHOOLS, *Appellees.*)

June 20, 1967

On July 29, 1966, there was issued out of the Elkhart Circuit Court a temporary injunction of broad scope, which restrained and enjoined the defendants (Appellants) in an action brought by the plaintiffs (Appellees) under and in pursuance of the Uniform Declaratory Judgment Act (Acts of 1927, Ch. 81, p. 208, Burns' Ind.Stat. 1946 Repl., § 3-1101 et seq.) seeking a declaration of rights, status and other legal relation between the parties and, an emergency having been alleged to exist, temporary injunctive relief likewise was sought until such asserted declaratory relief could be obtained. The parties to this appeal have agreed that in our consideration of the equity relief granted in the trial court, it will be necessary for us to consider the merits of the action as it pertains to declaratory relief, and such parties have expressed the wish to this Court that it decide the two issues. Under all of the circumstances presented to us herein, it will be our intention so to do.

There are many pertinent facts set forth in the briefs which have required consideration, but we think that such detailed facts do not require more than limited mention in this opinion.

Enactment of The School Corporation Reorganization Act of 1959, the same being contained in the Acts of 1959, Ch. 202, p. 451, et seq., as amended, is extremely significant in the consideration of this appeal. When one considers the declared public policy stated in the title of the Act, as well as the powers and duties of the county committees and the State Commission for the Reorganization of School Corporations created by said Act, one cannot escape the state of emergency which appeared to obtain, as well as the disappointment of the efficacy of previous

legislation designed to meet modern needs for public education. Great sums of money are expended annually for public education, and the enactment of the 1959 Act was the first breakthrough in the accomplishment and provisions for modern education in modern school houses by modern faculties with broad curricula—in theory, at least, the best that could be obtained for the money. While the attainment and success of these objectives and the public policy expressed may be questioned, the purpose is clear.

Hence, when the County Committee of Elkhart County embarked upon its duties and to fulfill its responsibilities, it had in mind, as the statute directs, county-wide reorganisation. The mere fact that the County Committee, with approval of the State Commission, was able to bring about the organization of Concord Community Schools in Elkhart County, the territorial limits of which were the same as its predecessor and included all of Concord Township except the Civil City of Elkhart it had accomplished but one phase of the task before it. This accomplishment did not require submission to the voters of the community school district. The fact that the County Committee's proposal to create the Elkhart Community Schools, after securing the approval of the State Commission, was defeated by the electorate bears significance only to the extent that such efforts failed. Indeed other efforts failed when submitted to the electorate.

In 1966, by appropriate and lawful resolutions, the Civil City of Elkhart annexed several adjacent and abutting territories after which the County Committee proposed that Elkhart Community Schools should be created and included in the territory to be served by such proposal the newly annexed territories, all of which lay in Concord

Township, and if the proposal finally were approved, it would mean that the Elkhart Community Schools would gain accretion and the Concord Community Schools would suffer diminution to the extent of the accretion. The procedures required were strictly followed and after approval by the State Commission of the County Committee's said proposal, the matter was submitted as required to the electorate of the territory involved in the proposal, which received an affirmative vote.

The necessary steps were taken to create the Elkhart Community Schools and the same would have come into existence at midnight on the close of June 30, 1966, except for the fact that the Appellees filed the action against the Appellants for the relief above mentioned. Subsequent to June 30, 1966, an amended complaint was filed, setting forth the development of facts from the date of the filing of the original action, namely: the coming into existence of the Elkhart Community Schools. To the amended complaint, Appellants filed their answer and a hearing was held, after due notice, on the question concerning whether a temporary injunction should be issued. The trial court held that such temporary injunction should issue and indeed it was issued. The finding and decision resulted in this appeal.

As we view the matter, announced public policy and the urgency expressed by the General Assembly of 1959 and the duties, as well as the responsibilities of those who became involved, such as the members of the County Committee and of the State Commission, the precise directions set forth and the provision for additional efforts after failure, we cannot escape the conclusion that the creation of Concord Community Schools, Elkhart County, Indiana, under the circumstances briefly set forth above, was but a small part of the over-all tasks to be performed in the

establishment of a county-wide school system and indeed a school system which might include more that one county.

We commend those citizens of Concord Township for their exhibited pride in their own community, such being one of the attributes which has made our nation strong, yet we must hold and decide that certainly until and unless the objective of the General Assembly through its created agencies comes to final fruition, other and different territorial divisions, alterations and changes can be made to provide the young people of Indiana with the very maximum facilities for the minimum amount of money.

While we rather believe that the territorial description of Concord Community Schools, which includes all of Concord Township except the Civil City of Elkhart, could be found to be in the nature of a reservation of territory which might be annexed in the future, we do not decide this question. We do express the opinion that in the light of the recent growth of so many communities, cities and towns, as well as suburbs outside the corporate limits of cities and towns, and the apparent desire for more and more people to move to the country, none of us can be sure where our children will attend school in the future. This will depend upon legislative enactment. The judgment herein rendered by the trial court is hereby reversed, with instructions to dissolve the temporary injunction, and the court is hereby ordered to enter a finding and judgment for the Appellants, defendants below, in accordance with the tenor hereof, both on the equity and the law questions presented.

ARTERBURN, J., concurs.

JACKSON, J., concurs in result.

HUNTER, C. J., dissents with opinion.

HUNTER, Chief Justice (dissenting).

I respectfully dissent from the majority opinion. The opinion by stressing the public policy phase of the School Corporation Reorganization Act of 1959 as amended in a general sense has in my opinion overlooked or disregarded some rather far reaching and limiting legislation adopted subsequent to and in many instances concurrent with amendments to said Act.

The appellants take the position that the case of Metropolitan School District of Concord Township v. State ex rel. School City of Elkhart (1963), 244 Ind. 232, 191 N.E. 2d 701 is controlling of the issues presented by this appeal. They assert that no applicable statute has been enacted by the legislature since that would change the law as laid down in said case. The appellants also state that this is recognized in the plans under which Concord Community Schools and Elkhart Community Schools came into existence.

The Concord plans provide:

> "The boundaries of the proposed community school district shall be those of Concord Township exclusive of the Civil City of Elkhart."

The plan under which Elkhart Community Schools came into existence provides:

> "The boundaries of the Elkhart Community Schools shall be those of Cleveland Township, Osolo Township, Washington Township and the Civil City of Elkhart combined as one unit."

The appellants then assert that "* * * both plans indicate that the boundaries are to be based upon the boundaries of the Civil City of Elkhart. As known to all, boundaries change with annexation * * * " These are the answers posed about events since *July 11, 1963.* In other

words the argument seems to be that Elkhart Community Schools are created in perpetuity consistent with any and all annexations to the City of Elkhart now and hereafter effected at least under present law. And indeed the majority opinion seems to lend support to such a theory of the law as advanced. The appellants assert "* * *Nothing has happened * * *" to change the applicability of the rules enunciated in the *Metropolitan School* case, supra, and that the rules there laid down are expressly applicable to this appeal.

The appellants advance a surprisingly simple argument in relation to said *Metropolitan School* case, supra. They simply state that since there was involved in said case the predecessor of Concord Community Schools, namely, Metropolitan District of Concord Township, and the predecessor of Elkhart Community Schools, namely, School City of Elkhart, that nothing has changed. True there was involved civil city annexations of territory out of Metropolitan School District of Concord Township and this court in holding that 1957 Act (§ 28-3727 et seq. Burns) was applicable, found that the civilly annexed areas there involved were transferred to the School City of Elkhart by reason of such civil annexation. However to say that nothing has changed or happened since to change the application of that case to issues before us, is to avoid recognition of several specific and pertinent facts as follows:

1. The 1957 Act does not apply for the reason that the *annexing school corporation* is a *community school corporation,* namely Elkhart Community Schools, and not a School City;

2. There is not involved here a Metropolitan School from whom land is being civilly annexed but rather

a community school corporation, namely, Concord Community Schools;

3. The Bodine Act was enacted *March 14, 1963* (§ 28-6203 et seq.) [28-6201 et seq.] which in effect deprives a city school corporation under the 1957 Act of taking land from a community school corporation without its consent.

4. Neither the County Committee for the Reorganization of School Corporations nor the State Commission, or both, acting in consort, have any right to take territory from an established community school corporation and transfer it to another school corporation.

The statute considered by this court in the *Metropolitan School District* case, supra, § 28-3727 reads as follows:

"Annexed territory—Definitions.—As used in this act (§§ 28-3727—28-3731), the following terms shall have the following meanings:

(a) 'City' or 'town' *shall be a city* or town *which conducts its school* as *school city* or school town *or* as *part of a consolidated or metropolitan school corporation.*

(b) *'Annexing school corporation'* shall be the *school corporation* of *any city* or town *which annexes territory.*

(c) 'Original school corporation' shall be a school corporation from whom territory is annexed.

(d) 'Annexed territory' shall be the territory annexed from an original school corporation by such city or town.

(e) 'Tax receipts' shall be the amounts received from the tax levy for the tuition and special school funds by the original school corporation from the annexed territory."

It is my view that the specific definitions of "city" or "town" and "annexing school corporation" contained in the 1957 Act as amended are especially significant when directed to the issues presented by this appeal. The only *school corporations involved* in this appeal are *community school corporations* organized under the comprehensive plan for reorganization of the Elkhart County School Corporations. They are clearly outside the four corners of the above statute.

It should be borne in mind that said Act was the deciding factor in this court's determination of issues presented in the *Metropolitan School District* case, supra. It also appears to be a logical conclusion that the 1957 Act was directed as a cure to the confusion then existing as a result of the case of Ft. Wayne Community Schools v. State ex rel. etc. (1959), 240 Ind. 57, 159 N.E.2d 708. In that case this Court held

> "that the finding and judgment of the lower court were correct in holding that for school purposes the territory annexed by the city of Ft. Wayne in the annexation proceedings remained under the jurisdiction of appellee, New Haven Public Schools, and did not by reason of the civil annexation come within the jurisdiction of appellant, Ft. Wayne Community Schools."

In the above case this Court in arriving at its decision had before it for interpretation such earlier statutes as Ch. 109 of the Acts of 1893 as amended, Burns §28-3304 et seq., Ch. 219 of the Acts of 1927 and amendments thereto (found in Burns § 28-3305), Ch. 158 of the Acts of 1938 (found in Burns § 28-3305a 1948 Replacement) and the School Consolidation Act adopted in 1947 and amendments thereto (found in Burns § 28-5901 et seq.) which was a general consolidation act as it applied to towns, city and

township schools. Since none of such earlier acts as referred to above specifically mentioned or attempted to deal with the acquisition of property and territory of a consolidated school corporation, in annexation proceedings by a civil unit of government, this court concluded as above set forth that such civil annexation did not effectuate a change of such annexed area from the New Haven school to the Fort Wayne school.

Thus it would appear that whatever the intent of the General Assembly might have been in the adoption of the 1957 Act as amended in effect it nullified the decision of this court in said *Ft. Wayne Community School* case, supra. The Acts of 1893, 1919, 1927 and 1935 explicitly were repealed by amendment to the 1957 Act effective March 9, 1959. On the same day the Indiana General Assembly enacted Ch. 89 Burns § 28-3365 et seq.

It therefore seems highly significant that when the 1959 General Assembly expressly repealed the above and aforementioned Acts by the adoption of Ch. 89 of the Acts of 1959, it also included the following:

> "28-3369. Construction of Act—This act (§§ 28-3365—28-3369) shall not be construed to permit or prohibit any annexation, except as provided in Section 4 (§ 28-3368), or to determine whether or to what extent any action by any civil city or town shall cause territory in an original school corporation to be acquired by another school corporation."

As was herein before mentioned the definitions in such 1957 Act as amended are expressly significant as hereinabove set forth. It is said Act on which the appellants rely to effectuate a transfer of the civilly annexed areas from the Concord Community Schools to the Elkhart Community Schools in the instant case. It seems obvious that the definitions of "city" or "town" embracing as they

do school city, school town, part of a consolidated or metropolitan school corporation could in no way embrace "community school corporations" for civil city annexation purposes. The annexing school corporation, namely Elkhart Community Schools, and the "original school corporation", namely Concord Community Schools, were both created and organized under Ch. 202 of the Acts of 1959 as amended (the same being the School Corporation Reorganization Act) and found in Burns § 28-6101 et seq. clearly do not fall within the four corners of the 1957 Act as amended.

The Indiana General Assembly of 1963 enacted Ch. 296 (commonly referred to as the "Bodine Act") Burns § 28-6201 et seq. and thereby set forth legislation which, in my opinion, is controlling of the issues presented in this appeal and the pertinent sections thereof are set forth as follows:

> "28-6201. Definitions.—As used in this act (§§ 28-6201—28-6208), the following terms shall have the following meanings:
>
> (a) 'School corporation' shall be any school corporation created pursuant to chapter 202, Acts 1959 (§§ 28-6101—28-6131), as originally adopted or as from time to time amended, and shall also be any other school corporation established under any other act or acts of the state of Indiana, which school corporation has common boundaries with any school corporation or corporations formed pursuant to chapter 202, Acts 1959, as originally adopted from time to time amended, but shall not include any public school corporation located in whole or any part in a county containing a civil city of the first class.
>
> (b) 'Annex', 'annexing', 'annexation' and 'school annexation' shall refer to any action whereby the boundaries of any school corporation are changed so that additional territory, constituting all or a part

of any one or more other school corporations, is transferred to it.

(c) 'Acquiring school corporation' shall be the school corporation which acquires territory as a result of annexation.

(d) 'Losing school corporation' shall be any school corporation which loses territory to an acquiring school corporation by annexation.

(e) 'Annexed territory' shall be the territory acquired by an acquiring school corporation as a result of annexation from a losing school corporation.

(f) 'Resolution' of a school corporation shall refer to a resolution duly adopted by its governing body.

28-6202. Authority to annex.—Subject to the limitations, and procedure set out in this act (§§ 26-6201—28-6208), any school corporation may annex territory from any other school corporation by resolutions of the acquiring and losing school corporations as provided in section 3 (§ 28-6203).

28-6203. Procedure for annexation—Resolution.—An annexation may be effected by any school corporation as follows:

(a) Both the acquiring and the losing school corporations shall each adopt a substantially identical annexation resolution. This resolution shall contain the following items:

(1) A description of the annexed territory. Such description shall as near as reasonably possible be by streets and other boundaries known by common names and need not be in addition by legal description unless such additional description is necessary to identify the annexed territory. No notice shall be defective if there is a good faith compliance with this section and if the area designated may be ascertained with reasonable certainty by persons skilled in the area of real estate description.

(2) The time the annexation takes place.

(3) Any terms and conditions facilitating education of pupils in the annexed territory, in the losing school corporation or in the acquiring school corporation. • • •

(4) Disposition of assets and liabilities of the losing school corporation to the acquiring school corporation; • • •

(b) After the adoption of such resolution, notice shall be given by the publication in both the acquiring and the losing school corporations setting out the text of the resolution, together with a statement that such resolution has been adopted and that a right of remonstrance exists as provided herein. • • •"

The Concord Community Schools came into existence, under the School Corporation Reorganization Act of 1959 as amended, on July 1, 1964. The Elkhart Community Schools came into existence July 1, 1966, having been approved by the voters residing in the areas specifically included in the plan submitted to such voters May 3, 1966 for their adoption or rejection.

The City of Elkhart enacted the following ordinances:

No.	Date of Enactment	Date of Last publication
2122	January 17, 1966	January 31, 1966
2127	February 7, 1966	February 21, 1966
2131	February 28, 1966	March 14, 1966
2145	May 16, 1966	May 31, 1966

All of said ordinances involved specific areas within the territorial boundaries of the then existent Concord Community Schools. In fact we point out by way of reference and information that ordinance No. 2145 was enacted following the favorable vote in the primary, May 3, 1966.

It would appear that this Court should very carefully examine and interpret the "School Corporation Reorganization Act" of 1959 and related annexation statutes as they apply to annexation proceedings of civil city units of government and specifically to the definitions of the "school corporations" affected thereby. The majority has not discussed the issues presented in this appeal and thereby created a vacuum in the area of law involved here.

It seems to this writer that the provisions of the "Bodine Act" of 1963 as amended contain the only operable guidelines for a determination of the issues involved in the civil annexation proceedings represented by ordinances numbered 2122, 2127, 2131 and 2145. It seems to me that said ordinances can not operate to effect an automatic transfer of the territorial areas of the Concord Community Schools to the Elkhart Community Schools and this Court should so hold. We should further hold that such territorial areas of the Concord Community Schools may only be transferred to the Elkhart Community Schools by a resolution of the governing bodies of said school corporations and then only under the terms and conditions set forth in the "Bodine Act", supra. Said Act is the only statute applicable to the annexation problems presented by this appeal.

We also should hold that the rules announced in the case of Metropolitan School District of Concord Township v. State ex rel. School City of Elkhart, *supra,* are not controlling of the questions presented here *re* annexation of territory from one community school corporation to another such corporation organized under the "School Corporation Reorganization Act" of 1959, ch. 202 thereof, or from any such community school corporation organized under such Act to any school corporation organized under any other act and having common boundaries with such

corporation organized under ch. 202, Acts 1959 except by joint resolutions of both said corporations; and under no circumstances should such a transfer of school territory be effected by the unilateral action of annexation of a civil city from such community school corporation.

I believe it is the duty of this Court to meet and dispose of the legal issues of the case as presented to us by the parties and it is my position that the majority has failed to do so. It further occurs to me that the majority, in evading any realistic discussion of such issues, has adopted what appears to be a rule of expediency applicable only to the case at bar. The matters discussed in this dissent have been ably and exhaustively presented by counsel for both parties in this case and judicial responsibility would seem to require that this Court judicially dispose of such issues. In other words the opinion adopted by this Court should be something more than an *ad hoc* decision. Counsel are to be commended for the excellence of their briefs.

The parties hereto have requested this Court to rule on the merits of their legal rights under the various statutes and case law under the Declaratory Judgment Act presented in the briefs as well as the case in equity all of which were submitted to the trial court.

Therefore, I would affirm the trial court in granting the injunctive relief; and I would determine the law to be with the Concord Community Schools and against the Elkhart Community Schools in the submission of this cause on its merits pursuant to the Declaratory Judgment Act.

SUPREME COURT OF INDIANA

STATE OF INDIANA, ON THE RELATION) AND FOR THE USE OF CONCORD COMMUNITY SCHOOLS, ELKHART COUNTY, INDIANA,

Appellants

vs.

SCHOOL CITY OF ELKHART, INDIANA, THOMAS BLACKBURN, as President and Trustee of School City of Elkhart, Indiana, MARION SHELLEY, as Vice-President and Trustee of School City of Elkhart, Indiana, JOHN BURT, as Secretary and Trustee of School City of Elkhart, Indiana, RALPH MILLER, as Treasurer and Trustee of School City of Elkhart, Indiana, PHILLIP BRYON, as Trustee of School City of Elkhart, Indiana, JOE C. RICE, as Superintendent of School City of Elkhart, Indiana,
CITY OF ELKHART, INDIANA,
CLARE F. GARBER, as Auditor of Elkhart County, Indiana, EVERETT L. DANIELSON, as Treasurer of Elkhart County, Indiana, LEWIS B. MILLER, ROBERT BOGER, ELWOOD BRANNON, RICHARD DOUTLICK, NELSON C. EATON, CHARLES FIELDS, LA VERN HOSTETLER, ORVILLE MILLER, CLIFFORD SMITH, as Members of and Constituting the Elkhart County School Reorganization Committee,
CUSTER BAKER, CHESTER BIDDLE, J. WILLIAM CHAMBERS, JOHN J. DILLON, AMELIA COOK, DICK HELLER, JR., HERBERT C. HOLMES, WILLIAM E. WILSON, BRYCE BOTTOM, as Members of and Constituting the Indiana State Commission for the Reorganization of School Corporations,
CLEVELAND SCHOOL TOWNSHIP, OSOLO SCHOOL TOWNSHIP, WASHINGTON SCHOOL TOWNSHIP, ELKHART COMMUNITY SCHOOLS,

Appellees.

CAUSE NO. 31034

October 6, 1967

MOTE, Judge.

In its Petition for Rehearing, the Appellee, Concord Community Schools, is critical of what does appear to be an erroneous statement of one fact. Annexation Ordinance #2145 was indeed enacted on May 16, 1966 and the last publication thereon was on May 31, 1966. The County Committee approved the plan for the creation of Elkhart Community Schools as of May 23, 1966, the State Commission approved it on March 31, 1966 and the same was voted on, together with other annexation ordinances, on May 3, 1966.

When this cause was submitted, both parties, in their briefs and at the oral arugment, requested that this Court decide the basic issue involved. This Court did so and we do not regard Appellee's complaint as either well founded or justified in view of its own request.

We stated that The School Corporation Reorganization Act of 1959, ch. 202, p. 451 et seq., was our primary guide in arriving at our decision. The opinion speaks for itself and ample language is contained therein to decide the questions presented upon reversal.

Appellee's petition for Oral Argument on the Petition for Rehearing is denied; the Petition for Rehearing is Denied.

JACKSON, LEWIS and ARTERBURN, JJ., concur.

HUNTER, C. J., dissents.

COURT OF APPEALS OF INDIANA
Third District

STATE OF INDIANA, ON THE RELATION AND FOR THE USE OF CONCORD COMMUNITY SCHOOLS, ELKHART COUNTY, INDIANA,
Appellant

vs.

SCHOOL CITY OF ELKHART, INDIANA; THOMAS BLACKBURN, as President and Trustee of School City of Elkhart, Indiana; MARION SHELLEY, as Vice-President and Trustee of School City of Elkhart, Indiana; JOHN BURT, as Secretary and Trustee of School City of Elkhart, Indiana; RALPH MILLER, as Treasurer and Trustee of School City of Elkhart, Indiana; PHILIP BYRON, as Trustee of School City of Elkhart, Indiana; JOE C. RICE, as Superintendent of School City of Elkhart, Indiana; CLARE F. GARBER, as Auditor of Elkhart County, Indiana; EVERETT L. DANIELSON, as Treasurer of Elkhart County, Indiana; CLEVELAND SCHOOL TOWNSHIP; OSOLO SCHOOL TOWNSHIP; WASHINGTON SCHOOL TOWNSHIP; ELKHART COMMUNITY SCHOOLS; LOUIS B. MILLER, ROBERT BOGER, ELWOOD BRANNAN, RICHARD DOUTLICK, NELSON C. EATON, CHARLES FIELDS, LA VERN HOSTETLER, ORVILLE MILLER, CLIFFORD SMITH, as members of and constituting the Elkhart County School Reorganization Committee; CUSTER BAKER, CHESTER BIDDLE, J. WILLIAM CHAMBERS, JOHN J. DILLON, AMELIA COOK, DICK HELLER, JR., HERBERT C. HOLMES, WILLIAM E. WILSON, BRYCE BOTTOM, as members of and constituting the Indiana State Commission for the Reorganization of School Corporations,
Appellees.

CAUSE NO. 3-972 A 66

January 30, 1973

ON APPELLEE ELKHART COMMUNITY SCHOOLS' MOTION TO DISMISS

PER CURIAM.

This cause is pending before the Court on the Motion of the appellee Elkhart Community Schools to Dismiss Appeal, Brief in Support of Motion to Dismiss, and the appellant's Brief in Opposition to said appellee's Motion to Dismiss.

The Motion to Dismiss alleges as cause therefor that the subject matter of this litigation has been adjudicated in a prior appeal of this case, and that the judgment sought to be appealed is not appealable because it was entered in accordance with the mandate of the Supreme Court of Indiana in the prior appeal.

The appellant's response to these allegations is that the Supreme Court did not have jurisdiction to render the decision it did in the prior appeal of this cause, and if it did have jurisdiction, it intended for the trial court to proceed to try the issues and not to summarily enter judgment.

The record herein reveals that this cause was commenced in May of 1966 by the plaintiff-appellant (Concord) filing its complaint for declaratory judgment and a temporary injunction. Thereafter, the trial court issued a temporary injunction enjoining the defendants Elkhart et al. from performing certain acts pertaining to school operation in particular territory previously annexed by the civil City of Elkhart under certain ordinances.

The defendants Elkhart appealed from this temporary injunction to the Supreme Court of Indiana. The Supreme

Court in its opinion (School City of Elkhart v. State ex rel. Concord Schools (1967) 248 Ind. 511, 227 N.E.2d 672) described the matter before it and the scope of its review as follows:

> "On July 29, 1966, there was issued out of the Elkhart Circuit Court a temporary injunction of broad scope, which restrained and enjoined the defendants (Appellants) in an action brought by the plaintiffs (Appellees) under and in pursuance of the Uniform Declaratory Judgment Act (Acts of 1927, Ch. 81, p. 208, Burns' Ind. Stat. 1946 Repl., § 3-1101, et seq.) seeking a declaration of rights, status and other legal relation between the parties and, an emergency having been alleged to exist, temporary injunctive relief likewise was sought until such asserted declaratory relief could be obtained. *The parties to this appeal have agreed that in our consideration of the equity relief granted in the trial court, it will be necessary for us to consider the merits of the action as it pertains to declaratory relief, and such parties have expressed the wish to this Court that it decide the two issues. Under all of the circumstances presented to us herein, it will be our intention so to do.*" (Our emphasis.)

The Court then proceeded with its discussion and decision of the case, and concluded its opinion with the following:

> "*. . . The judgment herein rendered by the trial court is hereby reversed, with instructions to dissolve the temporary injunction, and the court is hereby ordered to enter a finding and judgment for the Appellants, defendants below, in accordance with the tenor hereof, both on the equity and the law questions presented.*" (Our emphasis.)

In compliance with the direction of the Supreme Court, the trial court entered its judgment on November 21, 1967, dissolving the previously issued temporary injunction, declaring that the particular territory annexed by Elkhart

became an integral part of and within the boundaries of Elkhart Community Schools for all school purposes, tax purposes and otherwise, and that the County Committee for Reorganization of School Corporations for Elkhart County and the State Commission for Reorganization of School Corporations of Indiana were not legally powerless to include territories annexed by the civil City of Elkhart under certain ordinances within the boundaries of defendant Elkhart Community Schools. Thereafter, and within the time allowed, on December 19, 1967, Concord filed its motion for new trial which was not ruled on until four and a half years later, in July of 1972.

In the meantime, while the motion for new trial languished in the trial court, other litigation transpired between the same parties arising from Concord's adopting a Plan for Reorganization of Concord Community School, which plan attempted to remove certain territory from the boundaries of Elkhart's school system and include it within the boundaries of Concord's system. Elkhart filed its action for declaratory judgment seeking a judicial determination of the validity of Concord's plan. The trial court held Concord's plan was null and void insofar as it attempted to remove certain territory from Elkhart's boundaries and to place the same in Concord's boundaries.

That decision was appealed to the Appellate Court, which reversed the trial court. On transfer of the case to the Supreme Court of Indiana, the Supreme Court ordered the opinion of the Appellate Court vacated and it affirmed the judgment of the trial court. (Concord Comm. Schools, etc. v. State ex rel. Elkhart Community Schools (1971), Ind., 271 N.E.2d 468).

If there had been any doubt about the Supreme Court's intention in the earlier case, the Court firmly dispelled it in the second case by stating:

> "... *It was the decision of this Court in that case that a certain disputed territory was within the boundary of the school district of Elkhart, and this Court ordered the trial court to enter final judgment accordingly.* That opinion was handed down and effective on June 20, 1967." (Our emphasis.)

In affirming the trial court's judgment in the second case, that Concord's plan was null and void insofar as it sought to include territory previously determined to belong to Elkhart, the Supreme Court went on to say:

> "The trial court based this summary judgment in part upon a special finding that there is no right or power or authority in Concord or the Commission to 'circumvent and destroy the effect of an opinion in a case decided by the Indiana Supreme Court'. This ground alone, supported by the record as it is, is alone sufficient to sustain the judgment of the trial court that the actions of the Commission attempting to remove the disputed territory from the Elkhart School district be invalidated and declared to be of no legal force. This is so, because it was the intention of Concord and the Commission to nullify a decision of this Court and this intention is clear first, from the content of the resolution and plan as approved, dealing as they do solely with granting Concord the right to serve the exact territory granted to Elkhart by decision of this Court, and, second, from the fact that the action of the Commission here challenged occurred only a few weeks after this Court's decision. *The Commission by its actions, sought to alter a decision of this Court.* This the Commission has no authority to do." (Our emphasis.)

After the Appellate Court had decided the second case favorably to Concord and while that case was pending on transfer to the Supreme Court, Concord revived its pending motion for new trial in the first case, which is the subject of this appeal now before us, by asking that

the motion be set for argument. In due time argument was heard, the motion overruled and this appeal followed.

The main thrust of Concord's argument in this present appeal is found in its brief, as follows:

> "That on the original appeal of this case on the granting of a temporary injunction, under the Constitution and the laws of the State of Indiana, the Supreme Court had no right to consider anything but the question of the granting of the temporary injunction. The Court had no right, even with the consent of the parties, to sit as a court of original jurisdiction in determining the matter of declaratory judgment . . . that therefore, everything in the Court's opinion is obiter dictum except its order to dissolve temporary injunction."

After carefully reading the two opinions of the Supreme Court above cited, we conclude that in the first case, which was an appeal from the order of the trial court issuing a temporary injunction, the Supreme Court intended to, and did, decide the issues pertaining to the complaint for declaratory judgment as well as the appeal from the issuance of a temporary injunction. After deciding these matters, it instructed the trial court to enter findings and judgment for the appellants (Elkhart). The trial court obeyed the Supreme Court's directive and entered its judgment accordingly, which Concord now seeks to appeal. In the second case between the parties, the Supreme Court reiterated its intention in the first case by saying ". . . this Court ordered the trial court to enter final judgment accordingly."

We, therefore, agree with the appellee Elkhart that the entire subject matter of this litigation has been completely decided, determined and adjudicated in the prior appeal of this same case. In our opinion, the Supreme Court has

firmly closed the door on any further litigation between these parties on the same subject matter, namely that the territory annexed by the civil City of Elkhart pursuant to the Annexation Ordinances described in the Complaint for Declaratory Judgment and Temporary Injunction, and in the trial court's judgment, are a part of the territorial boundaries of Elkhart Community Schools.

It is not the prerogative of this Court to determine that the Supreme Court had no jurisdiction of a matter over which it assumed jurisdiction and decided, which we would have to do if we were to entertain this appeal.

The appellee's Motion to Dismiss is sustained, and this cause is dismissed.

SUPREME COURT OF INDIANA

STATE OF INDIANA, ON THE RELATION AND FOR THE USE OF CONCORD COMMUNITY SCHOOLS, ELKHART COUNTY, INDIANA,

Appellant

vs.

SCHOOL CITY OF ELKHART, INDIANA: THOMAS BLACKBURN, as President and Trustee of School City of Elkhart, Indiana; MARION SHELLEY, as Vice-President and Trustee of School City of Elkhart, Indiana; JOHN BURT, as Secretary and Trustee of School City of Elkhart, Indiana; RALPH MILLER, as Treasurer and Trustee of School City of Elkhart, Indiana; PHILIP BYRON, as Trustee of School City of Elkhart, Indiana; JOE C. RICE, as Superintendent of School City of Elkhart, Indiana; CLARE F. GARBER, as Auditor of Elkhart County, Indiana; EVERETT L. DANIELSON, as Treasurer of Elkhart County, Indiana; CLEVELAND SCHOOL TOWNSHIP: OSOLO SCHOOL TOWNSHIP: WASHINGTON SCHOOL TOWNSHIP: ELKHART COMMUNITY SCHOOLS; LOUIS B. MILLER, ROBERT BOGER, ELWOOD BRANNAN, RICHARD DOUTLICK, NELSON C. EATON, CHARLES FIELDS, LA VERN HOSTETLER, ORVILLE MILLER, CLIFFORD SMITH, as members of and constituting the Elkhart County School Reorganization Committee; CUSTER BAKER, CHESTER BIDDLE, J. WILLIAM CHAMBERS, JOHN J. DILLON, AMELIA COOK, DICK HELLER, JR., HERBERT C. HOLMES, WILLIAM E. WILSON, BRYCE BOTTOM, as members of and constituting the Indiana State Commission for the Reorganization of School Corporations,

Appellees.

CAUSE NO. 3-972 A 66

August 6, 1973

ARTERBURN, Chief Justice.

Appellant's "Petition to Transfer" is hereby denied this 6th day of August, 1973.

HUNTER, J., dissents with Opinion.

GIVAN, J., not participating.

HUNTER, Justice (dissenting).

Again, I must respectfully dissent from the majority's view in denying transfer in this cause and in so doing, I am restating *in toto* my dissent filed in the School City of Elkhart v. State ex rel. Concord Schools, reported in 248 Ind. 511 at page 515, 227 N.E.2d 672 at page 675:

[The dissenting opinion in the prior case is set out in full at pp. A-6—A-15, *supra*, and here omitted for the sake of brevity.]

* * *

And I dissented to this Court's refusal to grant rehearing in the case at page 524, 229 N.E.2d 824 and again, I dissented in the case of Concord Community Schools, Elkhart County, Indiana, et al. v. State of Indiana, on the relation of Elkhart Community Schools, Elkhart County, Indiana et al., Ind., 271 N.E.2d 470, Ind., as follows:

> "I must respectfully dissent. I agree with the majority's holding that the State Commission and Concord Schools cannot circumvent the conclusiveness of a judgment of this court; but, I feel that by our decision we would uphold the majority's erroneous interpretation of the controlling law as applicable to the facts in the previous decision concerning these parties, School City of Elkhart et al. v. State of Indiana ex rel. Concord Community Schools et al. (1967), 248 Ind. 511, 227 N.E.2d 672, [229 N.E.2d 824]. In

> **my view, we thus compound the error which we there committed. I need not extensively reiterate my stance as stated in my dissent to the prior decision. The previous decision affirmed the right of one community school corporation to *unilaterially* annex a portion of another community school corporation already in existence. This I feel is contrary to the 'Bodine Act' of 1963, IC 1971, 20-4-4-1 et seq. (Ind. Ann. Stat. § 28-3601 et seq.), which I still maintain provides the only operable guidelines for determining the issues of the case and should be controlling. Both parties in the previous suit asked that the case be decided on the merits, but the majority summarily brushed aside the issues *based on the facts* as it wandered through a vague discussion of public policy. Once again in the instant decision the majority seeks the way of expediency. Given an opportunity to reevaluate its previous position, the majority completely avoids an examination on the merits.**
>
> **"Under no circumstances can I accede to the sanction of our previous decision as ruling precedent law. In my view, by committing a second legal wrong we do not make it legally right."**

In conclusion, I am of the opinion that the Judiciary should always be pervious to demonstration of original error, and consequently, where Judicial error is apparent, it should be judicially corrected for not to do so is to indulge the principle of the "aristocracy of the robe." Jenkins v. Review Board of Ind. Emp. Sec. Div., 138 App. 12, 23, 211 N.E.2d 42.

As stated by Justice Cardozo, "The tide rises and falls, but the sands of error crumble." Cardozo, The Nature of the Judicial Process, p. 177.

Notwithstanding my recognition of the principles of res judicata, it is now my view that by committing a third legal wrong, we do not make such original error legally right.

APPELLATE COURT OF INDIANA

Division No. 1

CONCORD COMMUNITY SCHOOLS, Elkhart County, Indiana, Dale Stauffer, as President and Trustee of Concord Community Schools, Willis Hershberger, as Vice-President and Trustee of Concord Community Schools, Elizabeth Weideman, as Secretary and Trustee of Concord Community Schools, Peter Classen, as Trustee of Concord Community Schools, Larry Overholser, as Trustee of Concord Community Schools, A. Bernart Hatch, as Superintendent of Concord Community Schools,
Appellants,

vs.

STATE of Indiana, on the Relation of ELKHART COMMUNITY SCHOOLS, Elkhart County, Indiana, Clare F. Barber, as Auditor of Elkhart County, Indiana, Esther A. Danielson, as Treasurer of Elkhart County, Indiana, Custer Baker, Chester Biddle, J. William Chambers, John J. Dillon, Amelia Cook, Bryce Bottom, William Smith, Herbert C. Holmes and Richard Wells, as Members of and Constituting the Indiana State Commission for the Reorganization of School Corporations,
Appellees.

CAUSE NO. 269 A 33

April 22, 1970.

Rehearing Denied May 21, 1970.

SULLIVAN, Judge.

This appeal originated as an action for declaratory judgment brought by the plaintiff-appellee, State of Indiana, on the Relation of Elkhart Community Schools, Elkhart County, Indiana, (hereinafter referred to as Elkhart) to

determine the validity of a 1967 school reorganization plan (hereinafter referred to as the Concord Plan of 1967) of defendant-appellant, Concord Community School, Elkhart County, Indiana, (hereinafter referred to as Concord) and to determine the rights of Concord and Elkhart resulting from the approval of the Concord Plan of 1967 by the Indiana State Commission for the Reorganization of School Corporations (hereinafter referred to as the Commission). The trial court denied Concord's motion for summary judgment and granted Elkhart's motion for summary judgment. The Court's judgment decreed the Concord Plan of 1967 null and void insofar as it attempted to remove certain disputed territory from within the territorial boundaries of Elkhart and insofar as it attempted to place the disputed territory within the territorial boundaries of Concord.

The only question before this court is the interpretation of the School Corporation Reorganization Act of 1959, Ind. Acts 1959, ch. 202, as found in Ind.Stat.Anno. § 28-6101 *et seq.* (Burns' 1968 Cum.Supp.), (hereinafter referred to as the School Act of 1959) as it applies to the following undisputed facts.

On July 1, 1964, Concord came into existence following the Commission's approval of a school reorganization plan (the Concord Plan of 1964). Concord's boundaries were described as:

> "• • • those [boundaries] of Concord Township exclusive of the Civil City of Elkhart."

At that time, by virtue of such description, the territory now disputed was included within Concord's boundaries.

After Concord came into existence and before Elkhart came into existence, the Civil City of Elkhart, by civil

annexation proceedings annexed the disputed territory as follows:

Ordinance No.	Date of Enactment	Date of Last Publication
2122	January 17, 1966	January 31, 1966
2127	February 7, 1966	February 21, 1966
2131	February 28, 1966	March 14, 1966
2145	May 16, 1966	May 31, 1966

On July 1, 1966, Elkhart came into existence following the Commission's approval of a school reorganization plan (hereinafter referred to as the Elkhart Plan of 1966). Elkhart's boundaries were described as:

> "* * * those of Cleveland Township, Osolo Township, Washington Township and the Civil City of Elkhart combined as one unit."

The formation of Elkhart completed the school reorganization of Elkhart County. The County Committee on School Reorganization was therefore dissolved, as required by the School Act of 1959.

On July 29, 1966, Concord obtained from the Elkhart Circuit Court a temporary injunction preventing Elkhart from coming into existence. Appeal was taken from that order. On June 20, 1967, the Supreme Court of Indiana reversed the judgment of the circuit court with instructions to dissolve the temporary injunction and enter findings and judgment for Elkhart. School City of Elkhart v. State of Indiana ex rel. Concord Community Schools (1967), 248 Ind. 511, 227 N.E.2d 672 (hereinafter referred to as Elkhart v. Concord).

On November 2, 1967, a meeting of the Commission was held with representatives of Concord in attendance. The

following excerpts from the minutes of that meeting are apposite:

> "Chairman Bottom next recognized the representatives of Concord Community Schools of Elkhart County. These representatives called to the attention of the Commission the recent decision of the Indiana Supreme Court in the case of School City of Elkhart, et al v. State of Indiana on the Relation and for the use of Concord Community Schools, Case No. 31034, [248 Ind. 511] 227 North Eastern Reporter, Second Series, page 672. They pointed out that the Supreme Court determined that the State Commission for the Reorganization of School Corporations had intended to reduce the boundaries of the Concord Community Schools when it approved the Plan for formation of the Elkhart Community Schools on March 31, 1966, wherein it described the boundaries of the Elkhart Community Schools as including the boundaries of the Civil City of Elkhart as of March 31, 1966.
>
> "It was further pointed out that between the date of the creation of Concord Community Schools on July 1, 1964, and the approval by the State Commission of the formation of Elkhart Community Schools, the Civil City of Elkhart had passed several annexation ordinances, annexing land which was located within the geographic boundaries of Concord Community Schools. The effect of these annexations was to increase the territorial boundaries of the Civil City of Elkhart so that the confusion has arisen as to whether the State Commission for the Reorganization of School Corporations intended the boundaries of Elkhart Community Schools to include the territory annexed by the Civil City of Elkhart after July 1, 1964, or whether the State Commission intended the territorial boundaries of Concord Community Schools to remain the same as the boundaries were when Concord Community Schools came into existence on July 1, 1964.

"After some discussion, Mr. Champa made a motion, seconded by Mr. Biddle, that the following resolution be adopted to officially express the intent of the State Commission for the Reorganization of School Corporations in connection with the adoption of the Plan for the formation of Elkhart Community Schools on March 31, 1966.

"RESOLVED: That when the State Commission for the Reorganization of School Corporations in Indiana approved the Plan of the Elkhart County Committee for the Reorganization of School Corporations in Elkhart County on March 31, 1966, by which Plan, among other things, the formation of Elkhart Community Schools was proposed, it intended that the territorial boundaries between the proposed Elkhart Community Schools and the Concord Community Schools would be the civil city boundary as it existed in Concord Township on July 1, 1964, such latter date being the date on which Concord Community Schools came into existence. In describing the territorial boundaries of Elkhart Community Schools in such Plan as including that of 'the Civil City of Elkhart' submitted by the Elkhart County Committee, it was the intention of the State Commission that the territorial boundaries of the Elkhart Community Schools should not include any territories annexed by the Civil City of Elkhart after July 1, 1964, from within Concord Civil Township. Further, it was intended by the State Commission that the formation of the Elkhart Community Schools would in no way or manner affect or alter the territorial boundaries of Concord Community Schools as the same were established on July 1, 1964, which was all of Concord Civil Township except the Civil City of Elkhart as it existed as of July 1, 1964. If the State Commission had intended to affect or alter the territorial boundaries so as to include the changes in the Civil City of Elkhart by reason of the civil annexations of land from within the Concord Civil Township after July 1, 1964, it would have required that the Plan include provisions

for the pro rata assumption of liabilities and indebtedness of Concord Community Schools by Elkhart Community Schools as mandated by Burns, Sections 28-6107 and 28-6111."

On December 8, 1967, the Concord Plan of 1967 was filed with the Commission. In describing the existing school corporations affected, the Concord Plan of 1967, in part, says:

> "The proposed Concord Community Schools district shall include the following existing school corporations:
>
> "Concord Community Schools
>
> "All that part of the Elkhart Community Schools lying outside of the corporate limits of the Civil City of Elkhart in Concord Township as said corporate limits existed on July 1, 1964, and as such corporate city limits are described above under boundaries, it being the intention to restore Concord Community Schools to its boundaries as existed at the time of its formation on July 1, 1964, and to restore to the Concord Community Schools the territories annexed to the Civil City of Elkhart in 1966, and which, by court determination, have been declared to be a part of Elkhart Community Schools."

The following excerpt is from the Minutes of the State Commission's meeting of March 5, 1968:

> "After discussion of the plan submitted by Concord Community Schools, Mr. Champa said, 'In order to define the boundaries between the Elkhart Community School Cor oration and those of the Concord Community School Corporation as the State Commission intended the boundaries of the Concord Community School Corporation to be as of July 1, 1964, and as of the time the Elkhart Community School Corporation Plan was approved, I move that the Plan for the Reorganization of Concord Community Schools of

Elkhart County, Indiana, be approved by this Commission.' Mr. Biddle seconded the motion. Motion carried unanimously."

After approval of the Concord Plan of 1967, the Commission published notices that Concord had complied with all of the requirements and that as a matter of law, Concord would come into existence on July 1, 1968. On July 23, 1968, Elkhart instigated the action which resulted in this appeal.

We are presented with virtually the identical problem decided by the Supreme Court in Elkhart v. Concord, *supra*. In that case the problem was whether pursuant to the School Act of 1959, supra, Elkhart could unilaterally annex territory from Concord under the guise of school reorganization. The Supreme Court, with one judge concurring in result, and one judge dissenting,[1] stressed the public policy consideration inherent in the 1959 School Act and thereby permitted the annexation to stand undisturbed. Judge Hunter's dissenting opinion[2] constitutes an exhaustive review of the law applicable to the case and although we agree most strongly with his interpretation of such law, we are bound by the majority opinion.

We agree with Judge Hunter's dissent that the majority opinion in the Elkhart v. Concord case seems to disregard or contravene the provisions of Acts 1963, ch. 296, as found in Ind.Stat.Anno., § 28-6201 *et seq.* (commonly known as the Bodine Act), insofar as "annexation" of territory by one community school corporation from another is concerned. The pertinent provision of the Bodine Act in this respect requires that "[b]oth the acquiring and the

1. On the date the opinion was filed a vacancy existed on the Supreme Court.

2. School City of Elkhart v. State of Indiana ex rel. Concord Community Schools, Elkhart County (1967), 248 Ind. 511, 515, 227 N.E.2d 672.

losing school corporations shall each adopt a substantially identical annexation resolution." Acts 1963, ch. 296, § 3, as found in Ind.Stat.Anno. § 28-6203 (1968 Cum. Supp.). Notwithstanding the apparent inadvertence of the majority in Elkhart v. Concord in their failure to apply the Bodine Act, the result of that majority opinion is unmistakable. It very specifically permitted one community school corporation to unilaterally acquire territory formerly within the boundaries of another community school corporation.

In our view, the provisions of the Bodine Act are and were patently clear and were applicable to the situation before the Supreme Court in Elkhart v. Concord. We are bound, however, by the majority opinion in that it clearly approved acquisition of territory by one school corporation from another by way of a reorganization plan approved by the State Commission and without regard to the provisions of the Bodine Act. Elkhart v. Concord, therefore, compels our acknowledgment of the right of the State Commission to approve and validate the 1967 Concord Plan and to thereby achieve a change in territory between the competing school corporations. Our interpretation and holding is supported by the following language in Elkhart v. Concord, 248 Ind. 511 at 514, 227 N.E.2d 672 at 674:

> "* * * [W]e must hold and decide that certainly until and unless the objective of the General Assembly through its created agencies comes to a final fruition, *other and different territorial divisions, alterations and changes can be made* to provide the young people of Indiana with the very maximum facilities for the minimum amount of money." (Emphasis supplied)

Concord contends that it had the right to file a petition with the State Commission for further reorganization

after the county committee was dissolved because of a provision in the School Act of 1959, which reads as follows:

> "(2) After a county committee has been dissolved, if *local school trustees* or the superintendent of public instruction deems further reorganization necessary *to improve educational opportunities for the pupils in the county,* such local school trustee or the state superintendent of public instruction shall submit proposed changes in the state commission, if in existence at the time, or if the state commission has been dissolved, to the commission on general education of the state board of education. If the changes proposed by such local school trustees or the state superintendent of public instruction are approved by the state commission, or by the general commission of the state board of education if the state commission has been dissolved, the proposal shall become effective under the procedure specified in section 7 of this act so far as the same are applicable." (Emphasis supplied) Ind. Acts 1959, ch. 202, § 11, as amended and as found in Ind.Stat.Ann. § 28-6122(2) (Burns' 1968 Cum.Supp.).

Elkhart questions Concord's interpretation of the phrase "local school trustees" contending that such phrase does not allow members of *any* board of trustees to submit the proposed change, but rather requires concerted action by the trustees of *all* the school corporations which would be affected. Such contention appears startlingly similar to a contention that the provisions of the Bodine Act requiring joint consent to acquisition are here applicable—a contention strikingly absent from Elkhart's earlier position in Elkhart v. Concord.

Elkhart also notes that the statute provides for the submission of proposed changes if the proper officers deem "further reorganization necessary to improve educational opportunities for the pupils in the county * * *", and argues that the statute does not refer to the improve-

ment of educational opportunities for the pupils in any one school's territory but to all the pupils in the entire county. Elkhart argues that the interpretation urged by Concord would encourage school corporations to "steal" territory from other school corporations, especially where the coveted territory has a high assessed valuation and few electors or pupils and that this would result in the taking away of educational opportunities from the pupils in the plundered school corporation.

We agree that unilateral annexation encourages "stealing" of territory and might result in the "stealing" of educational opportunities from the pupils in the plundered school corporation. These are exactly the consequence which the legislature sought to prevent by the Bodine Act and which the legislature seemingly sought to prevent by the previously quoted language imposing upon further reorganization plans the condition that such reorganization be for the improvement of educational opportunities for the pupils in the county. However, in the context of Elkhart v. Concord, we must reject Elkhart's interpretation. Such interpretation would require the agreement of all affected school corporations that further reorganization is necessary to improve educational opportunities for the pupils in the county. Elkhart v. Concord, on the other hand, by sanctioning unilateral annexation pursuant to reorganization procedures, renders agreement or disagreement among the affected parties immaterial. Indeed, unilateral action necessarily discounts the wishes and desires of all except the party taking the particular action.

It is of no consequence that the county committee was involved in the plan validated by the Supreme Court in Elkhart v. Concord and was not involved in the Concord Plan of 1967. Such distinction is meaningless because both

situations involve annexation of territory, by a school corporation, pursuant to the School Act of 1959, without the consent of the detrimentally affected school corporation.

For the foregoing reasons we now hold that: (1) The trial court erred in granting summary judgment in favor of Elkhart and in refusing to grant summary judgment in favor of Concord; (2) By virtue of the School Act of 1959, Concord had legislatively conferred authority to submit proposed changes to the State Commission; (3) By virtue of the interpretation of the 1959 School Act in Elkhart v. Concord said State Commission had the power and authority to approve and validate such reorganization changes even though the effect of such approval was the return of disputed territory to Concord without Elkhart's consent; (4) Such approval by said Commission does not circumvent the Supreme Court's opinion in Elkhart v. Concord; indeed such opinion in our view requires the result we reach here.

We cannot place much reliance in the equities of Elkhart's cry against unilateral annexation of the disputed territory by Concord under the guise of reorganization. It is to be remembered that Elkhart first obtained the disputed territory from Concord in precisely the same manner.

We now, therefore, reverse the decision and judgment of the trial court and remand the cause with instructions to grant and sustain Concord's motion for summary judgment and to enter judgment approving and validating the Concord Plan of 1967.

Costs are hereby assessed against relators.

LOWDERMILK, C. J., and CARSON and COOPER, JJ., concur.

SUPREME COURT OF INDIANA

CONCORD COMMUNITY SCHOOLS, Elkhart) County, Indiana, DALE STAUFFER, as Presi-) dent and Trustee of Concord Community Schools,) WILLIS HERSHBERGER, as Vice-President) and Trustee of Concord Community Schools,) ELIZABETH WEIDEMAN, as Secretary and) Trustee of Concord Community Schools, PETER) CLASSEN, as Trustee of Concord Community) Schools, LARRY OVERHOLSER, as Trustee of) Concord Community Schools, A. BERNART) HATCH, as Superintendent of Concord Com-) munity Schools,)
)
Appellants,)
)
vs.) CAUSE
) NO.
STATE OF INDIANA, on the Relation of ELK-)771 S 206
HART COMMUNITY SCHOOLS, Elkhart) County, Indiana, CLARE F. GARBER, As Audi-) tor of Elkhart County, Indiana, ESTHER A.) DANIELSON, as Treasurer of Elkhart County,) Indiana, CUSTER BAKER, CHESTER) BIDDLE, J. WILLIAM CHAMBERS, JOHN J.) DILLON, AMELIA COOK, BRYCE BOTTOM,) WILLIAM SMITH, HERBERT C. HOLMES) and RICHARD WELLS, as Members of and Con-) stituting the Indiana State Commission for the) Reorganization of School Corporations,)
)
Appellees.)

July 20, 1971

DeBRULER, Judge.

This appeal was first made to the Indiana Appellate Court which rendered an opinion reported as Concord

Community Schools et al. v. State of Indiana ex rel. Elkhart Community Schools, et al. (1970), Ind.App., 257 N.E. 2d 338, reversing the summary judgment of the trial court for the appellee and instructing the trial court to grant appellant's motion for summary judgment. The appellee below has petitioned this Court for transfer, which petition is now granted and the opinion and order of the Appellate Court is now ordered vacated.

The same parties before us in the case now on appeal, Concord Community Schools (hereinafter referred to as Concord) and Elkhart Community Schools (hereinafter referred to as Elkhart), were opposing parties in an appeal before this Court decided by written opinion reported as School City of Elkhart et al. v. State of Indiana ex rel. Concord Community Schools et al. (1967), 248 Ind. 511, 227 N.E.2d 672. It was the decision of this Court in that case that a certain disputed territory was within the boundary of the school district of Elkhart, and this Court ordered the trial court to enter final judgment accordingly. That opinion was handed down and effective on June 20, 1967. Rehearing was petitioned for and later denied on October 6, 1967. On November 2, 1967, Concord was successful in obtaining a resolution from the State Commission for the Reorganization of School Corporations (hereinafter referred to as the Commission) which had the effect of removing that same disputed area from Elkhart and putting it into Concord's district. On March 5, 1968, the Commission approved a plan entitled "Plan for Reorganization of Concord Community Schools of Elkhart County, Indiana" which had the effect of confirming the former resolution and transferring this same disputed territory to the jurisdiction of Concord.

The case now before us on appeal originated below as an action for declaratory judgment instituted by Elkhart,

seeking a judicial determination of the validity of the plan for reorganization approved by the Commission on March 5, 1968. The case was submitted to the trial court on motions of Elkhart and Concord for summary judgment and the trial court granted Elkhart's motion and entered judgment as follows:

> "IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court:
>
> "A. The 'Plan for Reorganization of Concord Community Schools' adopted by the Board of School Trustees of the Defendant, CONCORD COMMUNITY SCHOOLS, on November 30, 1967, approved by the Indiana State Commission for the Reorganization of School Corporations on April 2, 1968, and approved by registered voters in a petition which was filed in the Office of the Clerk of the Circuit Court of Elkhart County, Indiana, on the 22nd day of May, 1967, was and is null and void insofar as it attempts to remove the real estate described in Paragraph B below from within the territorial boundaries of Relator, Elkhart Community Schools, and to place the same within the territorial boundaries of the Defendant, Concord Community Schools, for school purposes, tax revenues or otherwise.
>
> "B. Each of the three (3) following described tracts of real estate, to-wit * * *."

The trial court based this summary judgment in part upon a special finding that there is no right or power or authority in Concord or the Commission to "circumvent and destroy the effect of an opinion in a case decided by the Indiana Supreme Court". This ground alone, supported by the record as it is, is alone sufficient to sustain the judgment of the trial court that the actions of the Commission attempting to remove the disputed territory from the Elkhart School district be invalidated and declared to be of no legal force. This is so, because it was the intention

of Concord and the Commission to nullify a decision of this Court and this intention is clear first, from the content of the resolution and plan as approved, dealing as they do solely with granting Concord the right to serve the exact territory granted to Elkhart by decision of this Court, and, second, from the fact that the action of the commission here challenged occurred only a few weeks after this Court's decision. The Commission by its actions, sought to alter a decision of this Court. This the Commission has no authority to do. Progressive Improvement Association of Downtown Terre Haute v. Catch All Corporation, West Terre Haute Laundry, Inc. (1970), Ind., 258 N.E.2d 403; State ex rel. Hovey v. Noble (1888), 118 Ind. 350, 21 N.E. 244. Appellants contend that Section 11 of the School Reorganization Act authorized the Commission to take the action here challenged. It is true that the Commission has authority delegated to it by the Legislature to alter the boundaries between existing School Corporations under the conditions there specified, however, that section cannot be lawfully construed to authorize the Commission to alter and deny conclusiveness to a court judgment.

The judgment of the trial court is affirmed and the costs of this action are ordered taxed against appellants.

ARTERBURN, C. J., and PRENTICE, J., concur.

HUNTER, J., dissents with opinion.

GIVAN, J., not participating.

HUNTER, Judge (dissenting).

I must respectfully dissent. I agree with the majority's holding that the State Commission and Concord Schools cannot circumvent the conclusiveness of a judgment of

this court; but, I feel that by our decision we would uphold the majority's erroneous interpretation of the controlling law as applicable to the facts in the previous decision concerning these parties, School City of Elkhart et al. v. State of Indiana ex rel. Concord Community Schools et al. (1967), 248 Ind. 511, 227 N.E.2d 672. In my view we thus compound the error which we there committed. I need not extensively reiterate my stance as stated in my dissent to the prior decision. The previous decision affirmed the right of one community school corporation to *unilaterally* annex a portion of another community school corporation already in existence. This I feel is contrary to the "Bodine Act" of 1963, IC 1971, 20-4-4-1 et seq. (Ind.Ann.Stat. § 28-3601 et seq.), which I still maintain provides the only operable guidelines for determining the issues of the case and should be controlling. Both parties in the previous suit asked that the case be decided on the merits, but the majority summarily brushed aside the issues *based on the facts* as it wandered through a vague discussion of public policy. Once again in the instant decision the majority seeks the way of expediency. Given an opportunity to re-evaluate its previous position, the majority completely avoids an examination on the merits.

Under no circumstances can I accede to the sanction of our previous decision as ruling precedent law. In my view, by committing a second legal wrong we do not make it legally right.

APPENDIX B

RELEVANT STATUTES

Citations are to Burns Indiana Statutes Annotated, 1970 Replacement.

§ 28-3505. (2) Within eight months after the effective date [March 15, 1963] of this amendatory act, the county committee shall complete and adopt a preliminary written plan for the reorganization of school corporations within the county.

Such plan and the final comprehensive plan shall provide for the incorporation of all areas of the county into one or more administrative units which can provide an efficient and adequate educational program for grades one through twelve, and which will meet the minimum standards adopted by the state commission under section 6 hereof, except as otherwise provided herein. [Ind. Acts 1959, ch. 202, § 5(2), p. 451; 1961, ch. 231, § 1(2), p. 544; 1963, ch. 381, § 1(2), p. 982.]

§ 28-3507. (4) The county committee in formulating a preliminary plan shall, with respect to each of the community school corporations which are a part of the reorganization plan, determine the following:

(a) The name of the community school corporation.

(b) A general description of the boundaries of the community school corporation which may consist of identifying an existing school corporation where it is to be included in its entirety in such community school corporation. Where a boundary does not follow the boundary of an existing civil or school corporation, the description shall

set out the boundary as near as reasonably possible by streets, rivers and other similar boundaries which are known by common names, and where this is not thus possible, by section lines or other legal description. No such description shall be defective if there is a good faith effort to comply with the provisions of this subsection 4(b), or if such boundary may be ascertained with reasonable certainty by a person skilled in the area of real estate description. The county committee shall have the authority to require the services of the county surveyor in preparing a description of any boundary line.

• • •

(f) The disposition of assets and liabilities in instances where an existing school corporation is divided.

(g) The disposition of school aid bonds, if any.

In instances where existing school corporations are not divided the assets, liabilities, and obligations of the existing school corporations are to be transferred to and assumed by the new community school corporation of which they are a part, without any provision therefor being made in the plan.

The preliminary plan shall be supported by a summary statement of (i) the educational improvements its adoption will make possible, (ii) data showing the assessed valuation, the number of resident pupils in average daily attendance in grades 1 through 12, the assessed valuation per each such pupil and the property tax levies, of each existing school corporation to which the plan applies, and such assessed valuation, resident average daily attendance and assessed valuation per pupil, of each proposed community school corporation if it were in existence in the year the preliminary plan is prepared or notices of

a hearing or hearings thereon is given by the county committee, and (iii) any other data or information the county committee deems appropriate or that may be required by the state commission in its rules and regulations. Such assessed valuations and tax rates shall be based on the valuations applying to taxes collected in the year the preliminary plan is prepared or notices of a hearing or hearings thereon is given by the county committee; the resident average daily attendance figures may be based on the calculation thereof under the rules and regulations pursuant to which they are submitted to the superintendent of public instruction by existing school corporations and shall be set out for the school year in progress in such year if they are available, or for the preceding school year if they are not. All such data and information shall be obtained by the county committee from any source deemed reliable by it, and the statement by the county committee shall be sufficient whether or not exactly accurate, if there is a good faith effort on its part to comply with the provisions of this paragraph. [Ind. Acts 1959, ch. 202, § 5(4), p. 451; 1961, ch. 231, § 1(4), p. 544; 1963, ch. 381, § 1(4), p. 982.]

§ 28-3509. (5) When any county committee has prepared its preliminary written plans for reorganization of school corporations, it shall fix dates and places for one or more hearings thereon and give notice thereof to all the residents of the school corporations affected and all interested parties. The county committee shall have the discretion as to whether to hold more than one hearing. Such notice shall be given by the chairman of the county committee by publication at least once in one newspaper of general circulation published in the school corporation or corporations, and if no newspaper is published in the school corporation or corporations, then in

a newspaper having a general circulation within the school corporation or corporations, at least ten days but not more than thirty days prior to the date set for such hearing.

At the hearing the county committee shall explain the proposed reorganization plan and summarize the educational improvements its adoption will make possible. A statement of the adjustment proposed for property, assets, debts and other liabilities shall be made in instances where any existing school corporation is to be divided. In such hearing, any resident of the county or of any affected school corporation in an adjoining county may be heard with reference to the proposed plan or any alternative plan. [Ind. Acts 1959 ch. 202, § 5(5), p. 451; 1961, ch. 231, § 1(5), p. 544; 1963, ch. 381, § 1(5), p. 982.]

§ 28-3510. (6) The committee shall consider any suggestions made in the public hearing and shall make any revisions or modifications in its written plans as it deems necessary and shall thereupon without any further hearing adopt its final comprehensive reorganization plan, and, within ten [10] days after such adoption, but not later than ten [10] months after the effective date [March 15, 1963] of this amendatory act, shall submit at least three [3] copies of its comprehensive plan to the state commission. . . . [Ind. Acts 1959, ch. 202, § 5(6), p. 451; 1961, ch. 231, § 1(6), p. 544; 1963, ch. 381, § 1(6), p. 982.]

§ 28-3512. (8) Any preliminary or final comprehensive plan of reorganization, adopted by the county committee before or after the date of this amendatory act, shall be sufficient as to form if it contains within its own terms or by reference the following for each proposed community school corporation:

• • •

(b) A general description of the boundaries of the community school corporation as provided in subsection (4);

• • •

(e) The disposition of assets and liabilities of any existing school corporation in instances where such school corporation is divided; and after the date of this amendatory act, if there is submitted or adopted with it the statement required by subsection (4) hereof. [Ind. Acts 1959, ch. 202, § 5(8), p. 451; 1961, ch. 231, § 1(8), p. 544; 1963, ch. 381, § 1(8), p. 982.]

§ 28-3517. (3) The state commission shall have the following powers and duties:

• • •

(c) The state commission shall receive and examine each plan for the reorganization of school corporations submitted to it by the county committees, and approve such plan when it is found by the state commission to provide for a satisfactory school organization.

• • •

(e) The state commission shall, within ninety days after receipt of a reorganizational plan, hold a public hearing in the county to which such reorganizational plan mainly appertains at which residents of the county or of any school corporation affected in an adjacent county or any other interested party shall be afforded an opportunity to appear before the state commission and be heard with reference to such reorganization plan. [Ind. Acts 1959, ch. 202, § 6(3), p. 451; 1963, ch. 377, § 1(3), p. 968.]

§ 28-3518. (1) Any party aggrieved by the decision of the county committee after the hearing provided for in

section 5 of this act, may appear before the state commission when said commission holds public hearings on the reorganization plan involved, and state his grievance.

(2) Any party feeling aggrieved by the decision of the state commission, after the hearing provided for in section 6 of this act, may appeal within thirty days from such decision to the court of competent jurisdiction in the respective county on any question of adjustment of property, debts and liabilities among the school corporations involved. Notice of the appeal shall be given to the chairman or secretary of the county committee ten days before same is filed with the court. The court shall have power to determine the constitutionality and the equity of the adjustment or adjustments proposed, and to direct the county committee to alter such adjustment or adjustments found by the court to be inequitable or violative of any provision of the constitution of the state or of the United States. An appeal may be taken to the appellate court of the state in accordance with the rules of civil procedure of the state of Indiana.

Any determination by the court with respect to the adjustment of property, debts and liabilities among the school corporations or areas involved shall not otherwise affect the validity of the reorganization or creation of any school corporation or corporations under the provisions of this act. [Ind. Acts 1959, ch. 202, § 8, p. 451.]

§ 28-3519. (1) After the state commission for the reorganization of school corporations has approved a comprehensive plan or partial plan for reorganization of school corporations as submitted to it by a county committee, the state commission shall promptly in writing, by certified United States mail with return receipt requested, give a notice of such approval to (a) the chair-

man of said county committee submitting the plan and (b) the judge of the circuit court of the county from which the county committee was appointed.

Thereafter any community school corporation proposed by the plan may be created either by petition as set out in the succeeding provisions of this subsection (1), by election as provided in subsection (2) or under the terms of subsection (2a) of this section.

At any time after the receipt of such plan by the county committee, before or after the election described in subsection (2), any such community school corporation may be created by a petition signed by fifty-five per cent or more of the registered voters residing within the boundaries of the community school corporation, determined in the manner set out below, and filed by any signer or by the county committee with the clerk or clerks of the circuit court or courts of the county or counties where such voters reside. Such petition shall state that the signers request the establishment of a community school corporation and shall contain the following information:

(a) The name of the proposed community school corporation.

(b) A general description of the boundaries as set out in the plan.

(c) The number on the board of school trustees.

(d) The manner in which the permanent board of school trustees, and the interim board if covered in the plan, shall be elected or appointed.

(e) The compensation, if any, of the members of the permanent and interim board of school trustees.

(f) The disposition, if any, of assets and liabilities of each existing school corporation which is included in the proposed community school corporation and has been divided.

(g) The disposition of school aid bonds, if any. [Ind. Acts 1959, ch. 202, § 7(1), p. 451; 1961, ch. 302, § 1(1), p. 816; 1963, ch. 380, § 1(1), p. 976.]

§ 28-3520. (2) If no such certification or combined certifications, thus creating any such community school corporation, are received within ninety days after the receipt of such plan by the chairman of the county committee, the judge of the circuit court of the county, from which the county committee submitting the plan was appointed, shall call a special election of the registered voters residing within the boundaries of such proposed community school corporation to determine whether such community school corporation shall be created. . . .

Notice of such special election shall be given by the judge by publication in one newspaper of general circulation published in the community school corporation, and if no newspaper is published therein, then in a newspaper, or newspapers if necessary, having a general circulation in such community school corporation, which notice shall be given not less than ten days nor more than fifteen days prior to the election. No other notice of such election, whether prescribed by the general election laws or otherwise, need be given.

Such notice of such special election shall clearly state that the election is called for the purpose of affording the registered voters an opportunity to approve or reject a proposal for the formation of a community school corporation and shall also contain a general description of the boundaries of the community school corporation as set

out in the plan, a statement of the terms of adjustment of property, assets, debts and liabilities of any existing school corporation where it is to be divided, the name of the community school corporation, the number of members comprising the board of school trustees, and the method of selecting the board of school trustees of the community school corporation. Said notice shall also designate the time, and voting place or places, at which the election will be held.

Such special election shall be under the direction of the county election board in the county and such election board shall take all steps necessary to carry out the election provided for in this section. The cost of conducting the election shall be charged to each component school corporation embraced in the community school corporation in the same proportion as its assessed valuation is to the total assessed valuation of the community school corporation, and shall be paid from any current operating fund not otherwise appropriated, without appropriation therefor by the respective school corporations. Where a component school corporation is to be divided and its territory assigned to two [2] or more community corporations its cost of the election shall be in proportion to its assessed valuation included in the community school corporation.

The ballot shall be in the following form:

> Shall the (here insert name) community school corporation be formed as provided in the Reorganization Plan of the ———— County Committee for the Reorganization of School Corporations?
>
> ☐ Yes ☐ No
>
> Place a cross (X) in the square desired.

Except as otherwise provided herein, the election shall be governed by the general election laws, including the registration laws of this state, insofar as they may be applicable.

If a majority of the votes cast at such special election on such question are in favor of the formation of such corporation, a community school corporation shall be created and come into being on July 1 or January 1 following the date of publication of said notice, whichever date is the earlier. In the event any public official shall fail to do his duty within the time prescribed in this subsection, this omission shall not invalidate the proceedings taken hereunder. No action to contest the validity of the formation or creation of a community school corporation under the provisions of this subsection (2) of this section 7, to declare that it has not been validly formed or created or is not validly existing, or to enjoin its operation shall be instituted at any time later than the thirtieth day following such election. [Ind. Acts 1959, ch. 202, § 7(2), p. 451; 1961, ch. 302, § 1(2), p. 816; 1963, ch. 380, § 1(2), p. 976.]

APPENDIX C

IN THE

SUPREME COURT OF INDIANA

SCHOOL CITY OF ELKHART, INDIANA, et al., *Appellants,*	)	
vs.	)	CAUSE
STATE OF INDIANA on the Relation and for the Use of Concord Community Schools, Elkhart County, Indiana, et al., *Appellees.*	)	NO. 31034

PETITION BY APPELLEE TO MODIFY A MANDATE TO THE TRIAL COURT

COMES NOW the Appellee, State of Indiana on the Relation and for the Use of Concord Community Schools, and moves the Court to modify or change the mandate of its opinion and decision in this cause, heretofore handed down on the 20th day of June, 1967.

In support of its motion, said Appellee shows:

1. That this cause was tried in the Elkhart Circuit Court on a complaint by the Appellee for temporary injunction and for declaratory judgment. A temporary injunction was granted from which the Appellants perfected an appeal. There was no hearing and no decision on the declaratory judgment. The parties, through their attorneys on appeal, agreed that the Court could decide

the case on the merits of the Complaint for Declaratory Judgment. The Appellants in Appellants' brief contended that by civil annexation to the Elkhart Civil City, the annexed territories became a part of Elkhart School City. Appellees in Appellees' brief contended that the 1963 Annexation Law applied and that there could be no annexation from a school corporation without following the procedure of the 1963 law which it was stipulated had not been followed. This court in its opinion and decision did not follow the contention of either party but found that Chapter 202 of the Acts of 1959, as amended, being the School Reorganization Law, was applicable and controlling in this cause. In this decision, Appellee Concord agrees in that the Elkhart Community Schools in the 1966 plan was proposed by the Elkhart Committee and approved by the State Commission and voted on by election on May 3, 1966, and approved by the voters of that election.

2. That the trial of this cause in the Elkhart Circuit Court was not held by the parties on the theory that Chapter 202 of the Acts of 1959 was applicable to this case. The parties did not brief this case on the theory that Chapter 202 of the Acts of 1959 applied and the ends of justice will be best served by remanding this cause and the granting of permission to the Appellee to reshape and reform the issues in this case for the following reasons:

A. Applying the 1959 School Reorganization Law to the 1966 proposal for the creation of the Elkhart Community Schools discloses no intention to divide Concord Community School as it was established and created in 1964 as a part of the comprehensive reorganization plan for Elkhart County. Such 1966 proposal for the Elkhart Community Schools shows no intention to take away a part of the Concord Community School as it was so formed

and place it with the Elkhart Community School for the following reasons:

(1) The name of Concord Community School is not mentioned as being affected by the Elkhart Community School proposal.

(2) In listing school districts to become a part of Elkhart Community School, no part of Concord Community School is mentioned, but only Elkhart School City, Cleveland School Township, Osolo School Township and Washington School Township.

(3) No provision is made for disposition of debts and liabilities of Concord Community School as required by Chapter 202 of the Acts of 1959 when a school district is divided by any proposed plan.

(4) In Table 2 of the 1966 proposal for Elkhart Community Schools wherein the assessed valuation of the proposed school corporation is set forth, no assessed valuation of any part of Concord Community School is listed. The assessed valuation of Elkhart City is shown to be Ninety-four Million Six Hundred Seventy-one Thousand Four Hundred Fifty Dollars ($94,671,450.00). This amount does not include any part of the territory annexed by the Civil City in 1966. The assessed value of $94,671,450.00 is the assessed valuation of the Elkhart School City and also the assessed valuation of the Elkhart Civil City as it existed in 1964, 1965 and prior to the annexation of February and March of 1966.

B. The notice of the election of May 3, 1966, at which the registered voters were given an opportunity to vote on the 1966 Elkhart Community School proposal includes as the places and precincts in Concord Township in which the election would be held only precincts of the City of

Elkhart as it existed in 1964 and 1965 prior to the annexations in February and March of 1966. No precinct of the area in Concord Community School is mentioned in the notice of elections. The annexed territory to the Civil City of Elkhart was not added to Elkhart City precincts by the County Commissioners until February 24, 1967. The notice published on April 20, 1966, in the *Elkhart Truth* for the election on the 1966 proposal for Elkhart Community Schools is as follows:

LEGAL NOTICE

State of Indiana, County of Elkhart, ss: In the Elkhart Circuit Court, April Term, 1966.

In re: Special election for Community School Corporation as authorized by Chapter 202 of the Acts of 1959 (as amended) of the Indiana General Assembly (by Section 28-6118), Burns Indiana Statutes annotated, 1948 replacement, (suppl.)

Notice of special election to all registered voters of each school corporation of Elkhart School City, Cleveland School Twp., Osolo School Twp., and Washington School Twp., in Elkhart County, Indiana.

The undersigned, pursuant to an order of the Judge of the Elkhart Circuit Court dated April 1, 1966, do hereby give notice to all registered voters within the school corporations of Elkhart School City, Cleveland School Twp., Osolo School Twp. and Washington School Twp., in Elkhart County, Ind., that said registered voters shall, at the primary election to be held on May 3, 1966, be given an opportunity to approve or reject a proposal to form a community school corporation as provided in the reorganization plan of Elkhart County Committee For Reorganization of School Corporations, to be known as "Elkhart Community School."

(1) The "Elkhart Community School", as proposed by the Elkhart County Committee For the

Reorganization of School Corporations, shall be organized as follows:

I *Name*

The name of the community school corporation shall be "ELKHART COMMUNITY SCHOOLS".

II *Boundaries*

The boundaries of the Elkhart Community Schools shall be those of Cleveland Township, Osolo Township, Washington Township and the Civil City of Elkhart as combined as one unit.

III *Existing School Corporation Included*

The proposed Elkhart Community Schools district shall include the following existing school corporations:

Elkhart School City
Cleveland School Township
Osolo School Township
Washington School Township

IV *Board of School Trustees*

A. The board of school trustees shall include seven (7) members.

B. The members of the board of school trustees shall be appointed to office without regard to political affiliation.

C. The community school district shall be divided into four (4) school board member districts to be designated as District A, B, C and D. Each member shall serve from a particular district and shall be a resident of said district.

1. District A

a. District A shall be comprised of the entire area within the corporate limits of the Civil City of Elkhart.

b. The appointments shall be made by the Mayor of the City of Elkhart with the approval of the Common Council of Elkhart City.

c. Four (4) school board trustees shall be appointed.

d. The original appointments shall be as follows:

2. Qualified voters.

3. Twenty-five years of age, or older, at the time of appointment.

4. Residents of the school corporation for a period of three years immediately prior to appointment.

5. Freeholders within the school corporation.

VI *Compensation of School Board Members*
The compensation of the members of the board of school trustees shall be three hundred dollars ($300) per year.

VII *Disposition of Assets and Liabilities*

a. Of Existing School Corporations. The assets of each present school corporation shall become assets of the proposed Elkhart Community School Corporation, and the liabilities of each present school corporation shall become liabilities of the proposed school corporation.

b. School Aid Bonds. The proposed school corporation shall pay to each civil township, civil city or civil town, located therein which has issued school aid bonds prior to the due date thereof, amounts sufficient to pay principal and interest on school and bonds.

(2) Time and Place of Voting. Said election will be held on May 3, 1966 between the hours of —— A.M. and —— P.M., E.S.T.; and the following are the places to which the voters residing within the proposed school corporation shall go to vote:

PRECINCT	*VOTING LOCATION*
Concord 25	Municipal Bldg.
Concord 27	Samuel Strong School
Osolo 29	Willowdale School
Concord 30	Western School
Concord 32	Mary Daly School
Concord 34	Rice School
Concord 36	Riverview School
Osolo 38	Beardsley School
Osolo 39	2625 Greenleaf Blvd.
Osolo 40	Northside Jr. High
Concord 41	Fire Station No. 4, W. Beardsley
Concord 42	Pumping Station
Concord 43	Fire Station No. 5, Simpson Ave. Monger School
Concord 44	Mary Beck School
Concord 46	Hawthorne School
Concord 50	Roosevelt School
Concord 52	Pierre Moran Pav.
Concord 54	Lincoln School
Concord 55	Fire Station No. 3, W. Indiana Avenue
Concord 56	Armory
Concord 57	Ulery School
Osolo 64	Mary Feeser School
Osolo 65	Airport
Osolo 66	Osolo Jr. High School
Osolo 67	Osolo Elementary Gym
Cleveland 80	Cleveland Center School
Washington 94	Bristol High School

Bernard L. Buckley:
Clerk, Elkhart Circuit Court

Elkhart County Election Board:
Bernard L. Buckley
Franklyn Deisch, Jr.
Lloyd G. Stump

Aldo J. Simpson,
Judge, Elkhart Circuit Court

Attorneys for Reorganization Committee:
James A. Simpson
Wilmer L. McLaughlin

April 20

C. The above notice provides for the disposition of assets and liabilities of existing school corporations in Section VII and in Section III under the title Existing School Corporation included the following statement is made:

> The proposed Elkhart Community Schools district shall include the following existing school corporation: Elkhart School City, Cleveland School Township, Osolo School Township, Washington School Township.

It will be noted that Concord Community School is not mentioned as an existing school corporation or any part thereof going into the Elkhart Community School District. In Paragraph VII of the notice concerning disposition of assets and liabilities, it refers only to that of existing school corporations going into the Elkhart Community Schools and here again no mention is made of the proposed disposition of any of the liabilities of Concord Community Schools.

The notice shows on its face that there was no intention to include any part of Concord Community Schools in the proposal and attention is directed to the beginning of the notice which contains the following statement: "Notice of special election to all registered voters of each school corporation of Elkhart School City, Cleveland School Twp., Osolo School Twp., and Washington School Twp., in Elkhart County, Indiana". This notice conclusively shows that the proposal and the election was directed only to the registered voters of each school corporation and

not to the voters in the Civil City of Elkhart with the annexations of 1966.

D. The State Commission for the Reorganization of School Corporations of the State of Indiana had no intention when it approved the 1966 proposal for Elkhart Community Schools to include any part of Concord Community School in such proposal. The following excerpts are from a meeting of said commission on June 7, 1966, as follows:

> The next order of business was regarding the Elkhart County Plan. The question was did the State Commission for the Reorganization of School Corporations intend to say Civil City of Elkhart or something else when they approved the Elkhart County Plan on March 31, 1966. It was established that the Commission intended to say School City of Elkhart.
>
> Resolved: That the State Commission for the Reorganization of School Corporations in Indiana does hereby state that on 3-31-66 in approving the plan of the Elkhart County Committee for the Reorganization of School Corporations, it had no intention of changing the boundaries of the Concord Community Schools Corporation, Elkhart, Indiana; that the State Commission has always taken the position that the county committees and the state commission have no jurisdiction to change the boundaries of a community school corporation created under Indiana Acts 1959, Chapter 202, as amended; that in describing the boundaries in the plan for the Elkhart Community Schools Corporation the State Commission mistakenly allowed the description to include the Civil City of Elkhart boundaries, when in truth and in fact, the State Commission intended said boundaries to include only the School Corporation Boundaries of the City of Elkhart within the plan for the Elkhart Community Schools Corporation.
>
> Vote to approve was unanimous.

That the minutes of said Commission of June 7, 1966, of which the above is an excerpt was certified by Arthur Campbell, Director as follows:

CERTIFICATE

I, the undersigned Arthur Campbell, as the duly appointed and qualified Director and Custodian of the official records of the Indiana State Commission for the Reorganization of School Corporations, hereby certify that the attached is an official copy of the Minutes of the Regular Meeting of the State Commission for the Reorganization of School Corporations on June 7, 1966.

Dated at Indianapolis, Indiana,
This 10th day of November, 1967.

Witness my hand and the Seal of the Commission the day and year above shown.

/s/ARTHUR CAMPBELL

Arthur Campbell, Duly Appointed and Qualified Director, State Commission for the Reorganization of School Corporations, State of Indiana

Seal of the Commission

Said State Commission has, since the trial in the lower court and the decision in this case, expressed its intention that in the approval of the 1966 proposal for Elkhart Community Schools it did not intend to in any way affect the boundaries of Concord Community School as it was established in 1964 and that it intended the boundary line between the proposed Elkhart Community School and the Concord Community School to be the Civil City boundary as it existed on July 1, 1964 and that the minutes of said

Commission on November 2, 1967, in Kokomo, Indiana, are as follows:

CERTIFICATE WITH RESPECT TO CERTAIN EXCERPTS FROM MINUTES OF A MEETING OF THE STATE COMMISSION FOR THE REORGANIZATION OF SCHOOL CORPORATIONS IN INDIANA HELD ON NOVEMBER 2, 1967, IN KOKOMO, INDIANA

Chairman Bottom next recognized the representatives of Concord Community Schools of Elkhart County. These representatives called to the attention of the Commission the recent decision of the Indiana Supreme Court in the case of *School City of Elkhart, et al, v. State of Indiana on the Relation and for the use of Concord Community Schools,* Case No. 31034, 227 North Eastern Reporter, Second Series, page 672. They pointed out that the Supreme Court determined that the State Commission for the Reorganization of School Corporations had intended to reduce the boundaries of the Concord Community Schools when it approved the Plan for formation of the Elkhart Community Schools on March 31, 1966, wherein it described the boundaries of the Elkhart Community Schools as including the boundaries of the Civil City of Elkhart as of March 31, 1966.

It was further pointed out that between the date of the creation of Concord Community Schools on July 1, 1964, and the approval by the State Commission of the formation of Elkhart Community Schools, the Civil City of Elkhart had passed several annexation ordinances, annexing land which was located within the geographic boundaries of Concord Community Schools. The effect of these annexations was to increase the territorial boundaries of the Civil City of Elkhart so that certain confusion has arisen as to whether the State Commission for the Reorganization of School Corporations intended the boundaries of Elkhart Community Schools to include the territory annexed by the Civil City of Elkhart after July 1,

1964, or whether the State Commission intended the territorial boundaries of Concord Community Schools to remain the same as the boundaries were when Concord Community Schools came into existence on July 1, 1964.

After some discussion, Mr. Champa made a motion, seconded by Mr. Biddle, that the foregoing resolution be adopted to officially express the intent of the State Commission for the Reorganization of School Corporations in connection with the adoption of the Plan for the formation of Elkhart Community Schools on March 31, 1966.

RESOLVED: That when the State Commission for the Reorganization of School Corporations in Indiana approved the Plan of the Elkhart County Committee for the Reorganization of School Corporations in Elkhart County on March 31, 1966, by which Plan, among other things, the formation of Elkhart Community Schools was proposed, it intended that the territorial boundaries between the proposed Elkhart Community Schools and the Concord Community Schools would be the civil city boundary as it existed in Concord Township on July 1, 1964, such latter date being the date on which Concord Community Schools came into existence. In describing the territorial boundaries of Elkhart Community Schools in such Plan as including that of "the Civil City of Elkhart" submitted by the Elkhart County Committee, it was the intention of the State Commission that the territorial boundaries of the Elkhart Community Schools should not include any territories annexed by the Civil City of Elkhart after July 1, 1964, from within Concord Civil Township. Further, it was intended by the State Commission that the formation of the Elkhart Community Schools would in no way or manner affect or alter the territorial boundaries of Concord Community Schools as the same were established on July 1, 1964. If the State

Commission had intended to affect or alter the territorial boundaries so as to include the changes in the Civil City of Elkhart by reason of the civil annexations of land from within the Concord Civil Township after July 1, 1964, it would have required that the Plan include provisions for the pro rata assumption of liabilities and indebtedness of Concord Community Schools by Elkhart Community Schools as mandated by Burns, Sections 28-6107 and 28-6111.

(NOTE: Certain portions of the Minutes not affecting the above resolution omitted.)

Vote to approve the above resolution was unanimous.

The duly qualified and Acting Secretary of the State Commission for the Reorganization of School Corporations, hereby certifies that the above and foregoing is a true and exact copy of certain excerpts from the Minutes of a meeting of the State Commission for the Reorganization of School Corporations held in Kokomo, Indiana, on November 2, 1967, with a majority of the Members present.

Dated and seal affixed this 9th day of November, 1967.

Amelia G. Cook/s

Amelia G. Cook, Secretary

Seal of the Commission.

E. Concord Community School, with its boundaries fixed as of July 1, 1964, has issued general obligation bonds in the sum of around Three Hundred Thousand Dollars ($300,000.00), that it has a Lease Rental Agreement with a holding corporation with annual rentals of One Hundred Forty Thousand Dollars ($140,000.00) per year and holding corporation bonds outstanding of Two

Million Dollars ($2,000,000.00) and owes the Common School Fund of Indiana One Hundred Eighty-six Thousand Dollars ($186,000.00). All of these bonds were issued and agreements entered into by Concord Community School as it existed after July 1, 1964, and no provision was made in the proposal for Elkhart Community Schools to assume any part of these liabilities and therefore the bond holders, holding corporations and taxpayers are affected without having received any notice of intention to disturb Concord Community School in any way.

F. Since the hearing in Elkhart Circuit Court in this case in 1966, Chapter 272 of the Acts of the General Assembly of 1967 have been enacted. This Act places the responsibility of paying all installments of lease-rental agreements with holding corporations on the local school corporation and they are required to levy a tax for such payment and if they fail to so make the payment, the State makes the payment on the lease-rental agreement and deducts the amount from State support to local schools. This makes the Two Million Dollar ($2,000,000.00) holding corporation obligation a liability of the Concord Community School and if the 1966 proposal for Elkhart Community Schools is construed to contain the annexed areas out of Concord Community School without any provision for this disposition of the liabilities, the Elkhart Community School would receive the annexed territories of an assessed valuation of over One Million Dollars without being required to assume any of the obligations incurred by Concord Community School after its coming into existence on July 1, 1964.

G. Pending the ruling on this Petition to Modify the Mandate to the Elkhart Circuit Court, the Court should issue a writ of prohibition prohibiting the Elkhart Circuit Court from entering any judgment on this court's opinion

of June 20, 1966, until after a ruling has been had on this Petition, for unless such writ of prohibition is issued, the Elkhart Circuit Court will proceed to enter judgment based on said opinion.

H. Certified copies of the Resolution of the State Commission are attached to the original of this Petition together with an affidavit of Marshall F. Kizer concerning the boundaries of precincts set forth in the Legal Notice of Election published April 20, 1966.

/s/ MARSHALL F. KIZER

Marshall F. Kizer, Attorney for Appellee, State of Indiana on the Relation and for the Use of Concord Community School, Elkhart County, Indiana

STATE OF INDIANA)
) SS:
MARSHALL COUNTY)

MARSHALL F. KIZER being first duly sworn upon his oath says: That he is one of the attorneys for the Appellee in the above cause, and he further says that the matters and things set forth in the above and foregoing Petition for Modification of Mandate of the Supreme Court are true as he verily believes.

/s/ MARSHALL F. KIZER

Marshall F. Kizer

Subscribed and sworn to before me, a Notary Public, this 14 day of November, 1967.

/s/ DONA FETHERALF

Notary Public

My commission expires:
Jan. 15, 1971

STATE OF INDIANA

SUPREME COURT OF INDIANA

SCHOOL CITY OF ELKHART, INDIANA, et al.,	)	
Appellants,	)	CAUSE NO.
vs.	)	31034
STATE OF INDIANA, ON THE RELATION AND FOR THE USE OF CONCORD COMMUNITY SCHOOLS, Elkhart County, Indiana, et al.,	)	AFFIDAVIT
Appellees.	)	

MARSHALL F. KIZER being duly sworn upon his oath says: That he is the attorney for the Appellee in the above entitled cause. Affiant further says that in connection with Appellee's Petition to Modify the Court's Mandate to the Elkhart Circuit Court, he has personally checked the records in the Auditor's Office of Elkhart County, Indiana, and found that on the 24th day of February, 1967, the Board of Commissioners of Elkhart County, Indiana, changed the boundaries of Concord precincts 43, 46, 48 and 56 by adding to such precincts the area annexed to the Civil City of Elkhart in the year 1966; that until February 24th, 1967, there had been no change in the boundaries of the above designated precincts from April 21st, 1964, until February 24th, 1967. Affiant further says that he has examined the legal notice published April 21, 1964, in the "Elkhart Truth", at which time the 1964 Comprehensive Plan for Elkhart Community Schools was proposed and that the voting precinct numbers, as set forth in said Notice insofar as it affects the boundary line between Concord Community Schools and the Civil City of Elkhart, were the same.

AFFIANT FURTHER SAYS that he has checked with the State Board of Tax Commissioners of Indiana and learned that the assessed valuation of the Elkhart School City as of March 1st, 1965, was Ninety-Four Million Six Hundred Seventy-one Thousand Four Hundred Fifty Dollars ($94,671,450.00) and that this is the same figure that the Elkhart County School Reorganization Committee placed in their 1966 proposal for Elkhart Community Schools as the assessed valuation of Elkhart City in the proposed School Corporation.

AND FURTHER YOUR AFFIANT SAITH NOT.

/s/ MARSHALL F. KIZER

Marshall F. Kizer

Subscribed and sworn to before me, a Notary Public in and for said county and state, this 14 day of November, 1967.

/s/ DONA FETHEROLF

Dona Fetherolf
Notary Public

My commission expires:
January 15, 1971

APPENDIX D

IN THE ELKHART CIRCUIT COURT
SEPTEMBER TERM 1967

STATE OF INDIANA)
) SS:
ELKHART COUNTY)

STATE OF INDIANA, ON THE RELATION AND FOR THE USE OF CONCORD COMMUNITY SCHOOLS, ELKHART COUNTY, INDIANA,
Plaintiff

vs.

SCHOOL CITY OF ELKHART, INDIANA, et al.,
Defendants

CAUSE NO. 33530

PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

COMES NOW the Plaintiff and moves the court for leave to amend its complaint in the above entitled cause by adding a new rhetorical paragraph number 31, to read as follows:

That the boundary line between Elkhart Community Schools and the Concord Community Schools is formed by the City Limits of the City of Elkhart and Concord Township as such city limits were designed as of July 1, 1964; that the 1966 proposal of the County Committee for the reorganization of schools as approved by the State Commission on March 31, 1966, in no way affected the

Elkhart Community Schools and such plan did not intend to take any territory away from Concord Community Schools and transfer it to the Elkhart Community Schools; that the provision of said 1966 plan for Elkhart Community Schools as a whole, indicates no intention of taking any territory away from Concord Community Schools as it was established as of July 1, 1964. That nowhere in said plan does the name of Concord Community Schools appear at any place. That no provision in said plan was made for the disposition of liabilities of Concord Community Schools as would be required by law if it were being divided by such proposal; that the amount of the assessed valuation of the proposed Elkhart Community Schools does not include any of Concord Community School territory and does not include any of the assessed valuation of the annexed areas to the Civil City of Elkhart; that in the notice of election required to be given to the voters in the territory proposed for the Elkhart Community Schools, no precinct or voting place was described in said notice that included any of the annexed areas, and so there was nothing in either the proposed plan or the notice to indicate that Concord Community Schools were to be affected by the 1966 proposal for the Elkhart Community Schools. That in relation to the boundary between Concord Community Schools and the Elkhart Community Schools, there is an ambiguity, for in both the 1964 comprehensive plan for Elkhart County and the 1966 plan for Elkhart Community Schools, the boundary is referred to as the City Limits of Elkhart City, in that, in each plan, Elkhart City is referred to as being in the Elkhart Community Schools and Concord Community School is referred to as being all of Concord Township except the Civil City of Elkhart; that this ambiguity should be clarified and the court should determine the intention of the County Committee and the State Committee not only from their

statement but from their acts that the boundary line between these two school districts should be the City Limits of the City of Elkhart in Concord Township as it existed on July 1, 1964, and thereby laying at rest any future controversy between the school districts as to their boundary as a result of any future annexations by the Civil City. That the State Commission for the reorganization of schools has declared by Resolutions that they had no intention to in any way disturb Concord Community Schools as it was established July 1, 1964, and that it was their intention that the boundary line of the City of Elkhart as it existed on July 1, 1964, be the boundary line for the Concord Community Schools and the Elkhart Community Schools and that annexation of territory by the Civil City would in no way affect the territory of Concord Community Schools and its assessed valuation.

That the prayer for relief should be amended by adding a paragraph designated D, as follows:

That there be a determination of this court of the boundary line between the Concord Community School and the Elkhart Community School to be the City Limits of the City of Elkhart in Concord Township as it existed on July 1, 1964 and that the annexation by the City of Elkhart in 1966, or at any time thereafter, should not in any manner affect said boundary line and that all of the taxes collected in the territories determined herein to be that of Concord Community Schools should be turned over by the Auditor and Treasurer of Elkhart County to the Concord Community Schools, together with all other and proper relief in the premises.

KIZER AND NEU
BY /s/ MARSHALL F. KIZER

Marshall F. Kizer
Attorney for Plaintiff

MEMORANDUM

As a Memorandum to the above Motion, the plaintiff now attaches hereto and makes a part hereof, a Petition for Modification of Mandate filed with the Supreme Court of Indiana and its brief in support thereof.

Respectfully submitted,

KIZER AND NEU
BY /s/ MARSHALL F. KIZER

Marshall F. Kizer
Attorney for Plaintiff

[The attached and incorporated Motion to Modify filed in the Supreme Court of Indiana together with Affidavit is here omitted and reproduced in full in Appendix C, *supra.*]

APPENDIX E

IN THE ELKHART CIRCUIT COURT
SEPTEMBER TERM
1967

STATE OF INDIANA)
) SS:
ELKHART COUNTY)

STATE OF INDIANA, ON THE RELATION)
AND FOR THE USE OF CONCORD COM-)
MUNITY SCHOOLS, ELKHART COUNTY,)
INDIANA,
Plaintiff)

vs.) CAUSE
) NO. 33530

SCHOOL CITY OF ELKHART, INDIANA,)
et al.,
Defendants)

MOTION FOR REHEARING

THE PLAINTIFF hereby moves the court that a hearing be had in the above entitled cause on Plaintiff's complaint for declaratory judgment and that evidence be heard to determine the rights of the parties under Chapter 202 of the Acts of 1959, as amended, in accordance with the decision of the Supreme Court in holding that said Chapter of said Acts of 1959, as amended, is the controlling Statute for the determination of the rights of the parties.

KIZER AND NEU
BY /s/ MARSHALL F. KIZER

Marshall F. Kizer
Attorneys for Plaintiff

MEMORANDUM

The court has not heard evidence and has made no finding and has not declared the rights of the parties under the relief prayed for for declaratory judgment. This case was not tried in the lower court on the temporary injunction or briefed in the Supreme Court on the theory that Chapter 202 of the Acts of 1959 was the controlling law applicable to this case. It would be unfair to the court and to the parties not to have a hearing and trial on the merits of the relief prayed for in the complaint for declaratory judgment under these circumstances even though the parties did, by counsel, agree that the Supreme Court could make a determination on the merits of a declaratory judgment; that plaintiff attaches hereto and makes a part of this Memorandum, his petition to Modify the Mandate, filed with the Supreme Court and Brief in support thereof.

Respectfully submitted,

KIZER AND NEU
BY /s/ MARSHALL F. KIZER

Marshall F. Kizer
Attorneys for Plaintiff

[The attached and incorporated Motion to Modify filed in the Supreme Court of Indiana together with Affidavit is here omitted and reproduced in full in Appendix C, *supra.*]

APPENDIX F

IN THE ELKHART CIRCUIT COURT

STATE OF INDIANA)
) SS:
COUNTY OF ELKHART)

STATE OF INDIANA, ON THE RELATION AND FOR THE USE OF CONCORD COMMUNITY SCHOOLS, ELKHART COUNTY, INDIANA, *Plaintiff*		
vs.	)	CAUSE NO. 33530
SCHOOL CITY OF ELKHART, INDIANA, et al., *Defendants*		

FINDINGS AND JUDGMENT OF THE COURT

The Court having heretofore on the 10th day of October, 1967, entered an Order in the above entitled cause directing the Clerk of this Court to spread of record in the Order Book of this Court the several opinions of the Supreme Court of Indiana certified by it in connection with an appeal from an Order of this Court granting a temporary injunction herein; and, pursuant to the mandate of the Supreme Court of Indiana the Court now finds for the Defendant, Elkhart Community Schools, and against the Relator, Concord Community Schools, on its amended complaint for Declaratory Judgment and for a temporary injunction.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. That the temporary injunction in favor of the Relator heretofore entered herein on the 29th day of July, 1966, be, and it hereby is dissolved;

2. That the rights of the Relator, Concord Community Schools, and of the Defendant, Elkhart Community Schools, are hereby determined and directed to be as follows:

(a) The territories annexed by the Civil City of Elkhart, Indiana, under Annexation Ordinances numbered 2122, 2127, 2131, and 2145, and each of them, became an integral part of and within the territorial boundaries of the Defendant, Elkhart Community Schools, for all school purposes, tax purposes and otherwise, under the laws of the State of Indiana;

(b) The County Committee for the Reorganization of School Corporations for Elkhart County, Indiana and the State Commission for the Reorganization of School Corporations for the State of Indiana were not legally powerless to include the territories annexed by the Civil City of Elkhart, Indiana under said Annexation Ordinances numbered 2122, 2127, 2131, and 2145, within the boundaries of the Defendant, Elkhart Community Schools.

All of which is finally ordered, adjudged and decreed by the Court this 21st day of November, 1967.

/s/ ALDO J. SIMPSON

Judge, Elkhart Circuit Court

APPENDIX G

IN THE ELKHART CIRCUIT COURT
SEPTEMBER TERM 1967

STATE OF INDIANA)
) SS:
ELKHART COUNTY)

STATE OF INDIANA, ON THE RELATION) AND FOR THE USE OF CONCORD COM-) MUNITY SCHOOLS, ELKHART COUNTY,) INDIANA,
Plaintiff)
vs.
SCHOOL CITY OF ELKHART, INDIANA,) et al.,
Defendants)

CAUSE NO. 33530

PLAINTIFF'S MOTION TO MODIFY JUDGMENT

COMES NOW THE PLAINTIFF in the above entitled cause and objects to the judgment in said cause and hereby moves the court to modify and correct the same, in this:

1. The judgment of the court does not conform to the findings of the Supreme Court as set forth in its opinion of June 20, 1967, and its opinion on the Petition for Re-Hearing rendered on October 6, 1967, in that, the findings show that annexation ordinance number 2145 was enacted on May 16, 1966, and the last publication was on May 31, 1966. The Elkhart Community School Plan was proposed by the County Committee in March and approved by the

State Commission on March 31, 1966. In the court's opinion of June 20th, the court says:

> **"In 1966, by appropriate and lawful Resolutions, the Civil City of Elkhart annexed several adjacent and abutting territories, *after which* the County Committee proposed that Elkhart Community Schools should be created and included in the territory to be served by such proposal the newly annexed territories, all of which lay in Concord Township, and if the proposal finally were approved, it would mean that the Elkhart Community Schools would gain accretion and the Concord Community Schools would suffer diminution to the extent of the accretion. The procedures required were strictly followed and after approval by the State Commission of the County Committee's said proposal, the matter was submitted as required to the electorate of the territory involved in the proposal, which received an affirmative vote."**

The court's judgment should be modified by striking out number 2145 where it appears in section 2(a) of the judgment and by striking out number 2145 where it appears in section 2 (b) of the judgment.

2. That Paragraph 2 (a) is erroneous, in that, there is no finding by the court upon which to base judgment that the annexed territories became a part of Elkhart Community Schools. Section 2 (a) of the judgment should be stricken.

3. That there was no finding upon which to base paragraph 2 (b) of the judgment. There is no finding indicating that the County Committee or the reorganization of School Corporation of Elkhart County and the State Commission intended that any of the annexed territories should be included in Elkhart Community Schools. The Supreme Court in its opinion on the Petition for Re-Hearing states:

"We stated that the School Corporation Reorganization Act of 1959, ch. 202, p. 451 et seq, was our primary guide in arriving at our decision. The opinion speaks for itself and ample language is contained therein to decide the questions presented upon reversal."

This statement of the court indicates that the lower court should apply Chapter 202 of the Acts of 1959 to the undisputed evidence in the cause in arriving at a decision on the questions presented upon reversal.

KIZER AND NEU
BY /s/ MARSHALL F. KIZER

Attorneys for Plaintiff

MEMORANDUM

Since the Supreme Court has decided that Chapter 202 of the Acts of 1959 is the law that should be applied in arriving at a decision in this case, Burns 28-6107 sets forth the contents of a preliminary plan for each of the Community School Corporations in connection with reorganization. Section -(b) provides for the giving of the boundaries, and in part applicable, is as follows:

"A general description of the boundaries of the community school corporation which may consist of identifying an existing school corporation where it is to be included in its entirety in such community school corporation."

The proposed Elkhart Community Schools as proposed by the County Committee and approved by the State Commission sets forth the following at Sec. 3:

"The proposed Elkhart Community Schools district shall include the following existing school corpora-

> tion: Elkhart School City, Cleveland School Township, Osolo School Township, Washington School township."

No mention is made or reference that any part of Concord Community Schools is intended to go into the Elkhart Community Schools. The naming of the Elkhart School City did not include the annexed territories, for according to the case of *Duda v. New Prairie United School Corporation*, —— Ind. App. ——, 224 NE (2d) 327, annexation by a Civil City does not have the effect of taking territory away from an already existing Community School organized under Chapter 202 of the Acts of 1959 even though the annexed territory of the Civil City extends into the Community School Corporation. The inclusion of the Elkhart School City into the Elkhart Community Schools did not, of itself, include any of the Elkhart Civil City annexations of 1966, as the Concord Community School was established as of July 1, 1964, in accordance with the comprehensive reorganization plan of Elkhart County which is in evidence in this case.

Sub-paragraph (f) of Burns 28-6107, provides as follows:

> "(f) The disposition of assets and liabilities in instances where an existing school corporation is divided."

Paragraph 7 of the Elkhart Community School Plan is as follows:

> "VII *Disposition of Assets and Liabilities*
>
> (a) Of Existing School Corporations. The assets of each present school corporation shall become assets of the proposed Elkhart Community School Corporation, and the liabilities of each present school corporation shall become liabilities of the proposed school corporation."

It will be observed that no mention is made of Concord Community Schools in either the section pertaining to what school corporations shall be included in Elkhart Community School and no mention is made in the paragraph in the Plan on disposition of assets and liabilities of Concord Community Schools and the only reference is that the assets of each present school corporation shall become assets of the proposed Elkhart Community School and the liabilities of each present school cororation shall become liabilities of the proposed school corporation.

In the Elkhart Community School Plan under supporting data, it provides, in part, as follows:

> "The Elkhart Community Schools will combine three (3) school townships with the Elkhart School City System."

also

> "Had the unit been in operation during all of 1965-66 the taxpayers of Elkhart City and Cleveland Township would have experienced an increase in the school tax rate while the taxpayers of Osolo and Washington Townships would have enjoyed a tax decrease."

Here again, no mention is made of the Elkhart Community School Plan in any way affecting Concord Community Schools.

In Tables 1 and 2 of the supporting data, no mention is made of Concord Community School being in any way affected by the proposed Elkhart Community Plan. Only the assessed valuation and tax rates are given for Cleveland Township, Osolo Township, Washington Township and Elkhart City without any mention of any part of Concord Community School being affected by the Elkhart Community School Plan.

Since the Elkhart Community School Plan was approved by the State Commission on March 31, 1966, certainly the County Committee and the State Commission could not possibly have intended to include Ordinance No. 2145 which was enacted on May 16, 1966, and the last publication thereof was on May 31, 1966. Even if the court accepts the mandate of the Supreme Court as final without any right on his part to examine the record, the opinion of the Supreme Court could not possibly be construed to include Ordinance No. 2145, which was enacted after the proposed Plan was made by the County Committee and approved by the State Commission.

In regard to Section 2 (b) of the judgment which sets forth that the County Committee and the State Commission were not legally powerless to include the territories annexed by the Civil City under said annexation ordinances No. 2122, 2127, 2131 and 2145 within the boundaries of defendant, Elkhart Community Schools, it certainly is not supported by any findings so far as Ordinance No. 2145 is concerned. At the time of the proposal by the County Committee and approval by the State Commission, Ordinance No. 2145 was not in existence so the County Committee and the State Commission could not have considered it, for it was not in existence at the time of the proposal by the County Committee, the approval by the State Commission and the election on May 3, 1966. The remaining part of Section 2 (b) of the judgment is a correct statement of the law in accordance with the Supreme Court opinion that Chapter 202 of the Acts of 1959 apply in this case, but when the entire Plan of Elkhart Community Schools is examined in its entirety, the County Committee and the State Commission could not possibly have intended to in any way affect Concord Community Schools. As the matter now stands, if it is the intention

and the decision of the court that a part of Concord Community Schools was transferred to and became a part of the Elkhart Community School by the proposed plan, then under the plan itself, Elkhart Community School would have to assume all of the liabilities of Concord Community Schools, for in the disposition of the assets and liabilities, the plan states:

> "The liabilities of each present school corporation shall become liabilities of the proposed school corporation."

Elkhart Community School Corporation would get the assets of Concord Community Schools in the annexed territory and would assume all of their liabilities. This is the only conclusion that could be reached if the judgment of the court is that the County Committee and the State Commission intended to remove a part of Concord Community Schools, an existing School Corporation, and place it into the Elkhart Community Schools. Since the Supreme Court has decided that Chapter 202 of the Acts of 1959 is the controlling Statute that applies to this case, then the terms of the Plan must be controlling as to the future rights of the parties as to the liabilities of Concord Community Schools.

Respectfully submitted,

KIZER AND NEU
BY /s/ MARSHALL F. KIZER

Attorneys for Plaintiff

APPENDIX H

ELKHART CIRCUIT COURT
DECEMBER TERM 1967

STATE OF INDIANA)
) SS:
ELKHART COUNTY)

STATE OF INDIANA, ON THE RELATION) AND FOR THE USE OF CONCORD COMMUNITY SCHOOLS, ELKHART COUNTY, INDIANA, *Plaintiff*)

vs.

SCHOOL CITY OF ELKHART, INDIANA, THOMAS BLACKBURN, as President and Trustee of School City of Elkhart, Indiana; MARION SHELLEY, as Vice-President and Trustee of School City of Elkhart, Indiana, JOHN BURT, as Secretary and Trustee of School City of Elkhart, Indiana; RALPH MILLER, as Treasurer and Trustee of School City of Elkhart, Indiana; PHILIP BYRON, as Trustee of School City of Elkhart, Indiana; JOE C. RICE, as Superintendent of School City of Elkhart, Indiana; CLARE F. GARBER, as Auditor of Elkhart County, Indiana; EVERETT L. DANIELSON, as Treasurer of Elkhart County, Indiana; CLEVELAND SCHOOL TOWNSHIP: OSOLO SCHOOL TOWNSHIP: WASHINGTON SCHOOL TOWNSHIP: ELKHART COMMUNITY SCHOOLS; LOUIS B. MILLER, ROBERT BOGER, ELWOOD BRANNAN, RICHARD DOUTLICK, NELSON C. EATON, CHARLES FIELDS, LA VERN HOSTETLER, ORVILLE MILLER, CLIFFORD SMITH, as members of and constituting the Elkhart County School Reorganization Committee; CUSTER BAKER, CHESTER BIDDLE, J. WILLIAM CHAMBERS, JOHN J. DILLON, AMELIA COOK, DICK HELLER, JR., HERBERT C. HOLMES, WILLIAM E. WILSON, BRYCE BOTTOM, as members and constituting the Indiana State Commission for the Reorganization of School Corporations, *Defendants*)

CAUSE NO. 33530

PLAINTIFF'S MOTION FOR A NEW TRIAL

THE PLAINTIFF in the above entitled cause moves the court for a new trial herein on each of the following grounds:

1. Irregularity in the proceedings of the court by which plaintiff was prevented from having a fair trial in this, to wit:

A. The court erred in overruling and denying plaintiff's motion for leave to amend its complaint.

B. The court erred in overruling and denying plaintiff's motion for a hearing on plaintiff's complaint for declaratory judgment.

C. That the court abused its discretion by denying to the plaintiff its right to amend its complaint for declaratory judgment after a determination by the Supreme Court that the law applicable to the case was Chapter 202 of the Acts of 1959, and further abused its discretion in denying the plaintiff a hearing on its complaint for declaratory judgment after the Supreme Court had declared that the law applicable to the case was Chapter 202 of the Acts of 1959, in that, there had not been a hearing either in the trial court or before the Supreme Court on the question of the intention of the County Committee and the State Commission in promulgating the 1966 Plan for Elkhart Community Schools as to whether or not Concord Community Schools were affected by such proposal.

2. The decision of the court is not sustained by sufficient evidence.

3. The decision of the court is contrary to law.

4. The court erred in overruling and denying plaintiff's motion to modify judgment rendered herein on November 21st, 1967.

KIZER AND NEU
309 E. Jefferson Street
Plymouth, Indiana 46563
By /s/ MARSHALL F. KIZER
Attorneys for Plaintiff

MEMORANDUM

The decision of the court is not sustained by sufficient evidence in the following particulars:

1. The Supreme Court, in its decision, has determined the law of the case to be that Chapter 202 of the Acts of 1959 is controlling in determining the questions involved. This law must then be applied to the evidence in this case before the court. The Elkhart County Reorganization Plan of 1964 is in evidence, also the 1966 Plan of Elkhart Community Schools is in evidence, and examined in the light of Chapter 202 of the Acts of 1959, they will disclose for the proposed Elkhart Community Schools the same boundaries proposed in 1964 as in the 1966 Plan. Burns 28-6107, provides the contents of a proposed Plan and Section (b) is as follows:

> "A general description of the boundaries of the community school corporation which may consist of identifying an existing school corporation where it is to be included in its entirety in such community school corporation. Where a boundary does not follow the boundary of an existing civil or school corporation, the description shall set out the boundary as near as reasonably possible by streets, rivers and other similar boundaries which are known by common names, and where this is not thus possible, by section lines

> or other legal description. No such description shall be defective if there is a good faith effort to comply with the provisions of this subsection 4 (b), or if such boundary may be ascertained with reasonable certainty by a person skilled in the area of real estate description. The county committee shall have the authority to require the services of the county surveyor in preparing a description of any boundary line."

As will be noted, this section of the statute provides that the general description may consist of identifying an existing school corporation where it is to be included in its entirety in such community school corporation. In both the 1964 and 1966 Plan of Elkhart Community Schools, the following statement is made:

> "The proposed Elkhart Community Schools district shall include the following existing school corporations: Elkhart School City, Cleveland School Township, Osolo School Township and Washington School Township."

The 1964 Plan and the 1966 Plan for Elkhart Community Schools contained the following statement under Boundaries:

> "The boundaries of Elkhart Community Schools shall be those of Cleveland Township, Osolo Township, Washington Township and the Civil City of Elkhart combined as one unit."

In both 1964 and 1966, a part of the Civil City of Elkhart was in Osolo Township, and thus, a part of the Civil City of Elkhart and Osolo Township was one and the same area. The true designation of territory going into the Elkhart Community Schools, both in 1964 and 1966, by the County Committee and the State Commission was the Elkhart School City, Cleveland School Township, Osolo School

Township and Washington School Township. In 1966, these were the only school districts not reorganized under Chapter 202 of the Acts of 1959 in Elkhart County. When the 1964 Comprehensive Plan was examined in relation to Concord Community Schools and the proposed Elkhart Community Schools in the 1964 Plan and in the 1966 Plan, it is obvious that the only conclusion that could be reached is that only the area comprising Elkhart School City in 1966 went into the Elkhart Community Schools. These Plans themselves do not constitute sufficient evidence for the court to determine that the area under annexation ordinances 2122, 2127, 2131 and 2145 went into the Elkhart Community Schools as a part of the Plan of the County Committee and State Commission. This is conclusively true of Ordinance 2145, for Ordinance 2145 was not passed by the City Council until May 16, 1966, and the proposal for Elkhart Community Schools was proposed by the County Committee and approved by the State Commission on March 31, 1966. No stretch of the imagination could conceive that the County Committee and the State Commission on March 31, 1966, intended the area involved in Ordinance 2145 to be a part of Elkhart Community Schools when such ordinance was not even in existence. It is a fundamental principle of law that if there is any ambiguity in an instrument to be construed, the intention must first be determined from the entire instrument and if there is still an ambiguity, the portion appearing last in the instrument shall be controlling. Since the Supreme Court did not decide that the annexed territory automatically became a part of Elkhart School City, the only way the annexed area could become a part of Elkhart Community Schools was as a result of the 1966 proposal of the County Committee and State Commission, and this Plan shows no intention of taking any part of Concord Community Schools into the Elkhart Community Schools.

In addition, the Appellate Court decision of DUDA v. NEW PRAIRIE UNITED SCHOOL CORPORATION, 224 NE (2) 327, holds that annexation by a Civil City does not have the effect of taking territory away from an already existing community school organized under Chapter 202 of the Acts of 1959, even though the annexed territory of the Civil City extends into such community school corporation.

2. The 1966 proposal for Elkhart Community Schools does not even mention in any place that the Concord Community Schools are being affected. Concord Community School is not mentioned in Section 3 as to existing school corporations to be included in Elkhart Community Schools and it isn't mentioned in Section 7 under disposition of assets and liabilities. Under the supporting data, there is no mention made of Concord Community Schools showing how it would be affected in any way by the Elkhart Community Schools. Under Tables 1 and 2 of the 1966 Elkhart Community Schools proposal, no mention is made of Concord Community Schools being affected in any way, and here again, the only school corporations shown to be affected are Elkhart City, Cleveland Township, Osolo Township and Washington Township.

Section (f) of Burns 28-6107, provides that the plan shall contain the disposition of assets and liabilities in instances where an existing school corporation is divided. Section (g) of said section, provides that where existing school corporations are not divided the assets, liabilities and obligations of the existing school corporations are to be transferred to and assumed by the new community school corporation of which they are a part, without any provision therefor being made in the plan.

If it was intended that a part of Concord Community Schools was being transferred to the Elkhart Community

Schools, the plan should have contained the provision concerning the disposition of assets and liabilities of Concord Community Schools. The plan was completely silent on this question.

Section (g) provides that the plan shall contain certain information concerning each existing school corporation to which the plan applies, and the part applicable of Section (g) of Burns 28-6107 is as follows:

> "The preliminary plan shall be supported by a summary statement of (i) the educational improvements its adoption will make possible, (ii) data showing the assessed valuation, the number of resident pupils in average daily attendance in grades 1 through 12, the assessed valuation per each such pupil and the property tax levies, of each existing school corporation to which the plan applies, and such assessed valuation, resident average daily attendance and assessed valuation per pupil, of each proposed community school corporation if it were in existence in the year the preliminary plan is prepared or notices of a hearing or hearings thereon is given by the county committee, . . ."

Here again, Concord Community School is not set forth showing its assessed valuation before and after the Elkhart Community Schools is created.

There isn't any evidence in this case but that the tables shown in the 1966 Elkhart Community Schools proposal was anything other than the School City of Elkhart as it then existed without any of the annexed territories.

3. Although this action was brought by Concord Community Schools for a declaratory judgment asking that the status of Elkhart Community Schools and Concord Community Schools be determined and specifically requesting that the area involved in annexation ordinances

2122, 2127, 2131 and 2145 be declared a part of Concord Community Schools. The court, by its judgment is, in effect, giving affirmative relief to the Elkhart Community Schools by declaring that the area in Ordinance Nos. 2122, 2127, 2131 and 2145 each became an integral part of the Elkhart Community Schools by the action of the County Committee and the State Commission approval on March 31, 1966. An essential element of evidence is missing to come to this conclusion, and that is, there is nothing in the record showing that notice was given to registered voters residing in Concord Community Schools.

In accordance with Burns 28-6118, the requirement for the notice is as follows:

> "Notice of such special election shall be given by the Judge by publication in one (1) newspaper of general circulation published in the community school corporation, and if no newspaper is published therein, then in a newspaper, or newspapers if necessary, having a general circulation in such community school corporation, which notice shall be given not less than ten (10) days nor more than fifteen (15) days prior to the election. No other notice of such election, whether prescribed by the general election laws or otherwise, need be given."

The contents of the notice is prescribed by law and is a part of Section 28-6118, as follows:

> "Such notice of such special election shall clearly state that the election is called for the purpose of affording the registered voters an opportunity to approve or reject a proposal for the formation of a community school corporation and shall also contain a general description of the boundaries of the community school corporation as set out in the plan, a statement of the terms of adjustment of property, assets, debts and liabilities of any existing school corporation where it is to be divided, the name of the

> community school corporation, the number of members comprising the board of school trustees, and the method of selecting the board of school trustees of the community school corporation. Said notice shall also designate the time, and voting place or places, at which the election will be held."

The record is completely silent on the giving of any such notice, and without this notice directed to the registered voters in a part of Concord Community Schools to be affected and without this notice showing that Concord Community School was being affected and containing provisions for the adjustment of property, assets, debts and liabilities of Concord Community Schools where it was to be divided, there isn't any basis for the court being able to say that the areas involved in annexation Ordinances No. 2122, 2127, 2131 and 2145 became a part of the Elkhart Community Schools.

In support of plaintiff's grounds in the Motion for New Trial, "That the decision of the court is contrary to law", the plaintiff respectfully states to the court:

(1) All that plaintiff has stated above in this Memorandum in support of its grounds for motion for New Trial "That the decision of the court is not sustained by sufficient evidence" is incorporated by reference and made a part of this Memorandum in support of the ground "That the decision of the court is contrary to law".

(2) The Supreme Court has said that the law of the case is Chapter 202 of the Acts of 1959, being the school reorganization law. When this law is applied to the evidence before the court in this case, it will disclose that the court's decision that the area involved in civil annexation ordinances to the City of Elkhart numbered 2122, 2127, 2131 and 2145 is contrary to the law for the following reasons:

(a) The name of Concord Community Schools is not mentioned as being affected by the Elkhart Community School proposal of 1966. Burns 28-6107 specifically provides that where a plan proposes to divide an existing school corporation, a provision must be set forth therein as to the disposition of the assets and liabilities of such divided school corporation. No mention is made in the 1966 plan of Elkhart Community Schools of Concord Community Schools being divided and what disposition would be made of the assets and liabilities of Concord Community Schools. The only mention that is made in said plan as to disposition of assets and liabilities of existing school corporation is as follows:

> "The assets of each present school corporation shall become assets of the proposes [sic] Elkhart Community School Corporation, and the liabilities of each present school corporation shall become liabilities of the proposed school corporation."

This is exactly the law where no school corporation is to be divided and in Burns 28-6107 (g) as to the contents of the plan, the following provision is made:

> "In instances where existing school corporations are *not divided* the assets, liabilities and obligations of the existing school corporations are to be transferred to and assumed by the new community school corporation of which they are a part, without any provision therefor being made in the plan."

One or the other of two propositions must be true. First, either that the statements in the Plan shows no intention to divide any existing school corporation and that would mean no intention to divide Concord Community Schools, OR it means, that if Concord Community School was intended to be divided by the annexed areas being transferred to Elkhart Community Schools, then the Elkhart

Community Schools would assume all of the liabilities of Concord Community Schools. The evidence in this case shows the assessed valuation of Concord Community Schools to be around Sixteen Million Dollars ($16,000,000.00). It also shows the assessed valuation of the area involved in Ordinances No. 2122 and 2131 to be around One Million Dollars ($1,000,000.00). There is nothing in the 1966 proposed plan for Elkhart Community Schools as to the amount of the indebtedness of Concord Community Schools, nor is there anything in the 1966 proposed plan for Elkhart Community Schools as to the indebtedness of Concord Community Schools. Since the law was not followed in the 1966 proposal for Elkhart Community Schools insofar as it affected Concord Community Schools, the plan is invalid as it affects Concord Community Schools and the court's decision that the annexed territories involved in Ordinances 2122, 2127, 2131 and 2145 is contrary to law.

(3) There is no evidence in the record that notice was given in accordance with the law as to the election held on May 3, 1966. The record does show that there was an election held and that Elkhart Community Schools of 1966 was attempting to come into existence under Burns 28-6118. This section of the law provides that notice *shall* be given and that such notice *shall* clearly state that the election is called for the purpose of affording the registered voters an opportunity to approve or reject the proposal and shall designate the time, the voting place or places at which the election will be held. This section of the law also provides that the notice shall contain a statement of the terms of adjustment of property, assets, debts and liabilities of any existing school corporation where it is to be divided. The record in this case is absolutely void of any such notice having been given to any of the

registered voters of Concord Community Schools. Without any evidence in the record of such notice, the plan is void as it affects Concord Community Schools and the areas involved in Elkhart Civil City annexation Ordinances No. 2122, 2127, 2131 and 2145 could not be legally declared a part of the Elkhart Community Schools by the court.

(4) In the decision of the court on the declaratory judgment, no determination has been made by the court as to the disposition of the liabilities of Concord Community Schools. If the annexed areas involved passed to the Elkhart Community Schools from the Concord Community Schools by virtue of the 1966 plan for Elkhart Community Schools, then it must have contained a provision concerning the disposition of liabilities. There isn't any statement of Concord Community Schools liability in the 1966 plan for Elkhart Community Schools and there is no evidence in the record of this case as to the liabilities of Concord Community Schools. However, if the court is going to say that these annexed areas passed to Elkhart Community Schools, then in stating the rights of the parties, it should have stated that the Elkhart Community Schools shall assume all of the liabilities of Concord Community Schools as this is the only statement in the 1966 plan concerning disposition of liabilities of existing school corporations.

It is contrary to law for the court to state that the annexed areas passed to the Elkhart Community Schools as a result of the 1966 plan for Elkhart Community Schools without stating the disposition of the liabilities of Concord Community Schools to the effect that the Elkhart Community Schools shall assume all of their liabilities in accordance with such plan. The court has held in its decision that the county committee and the State Commission were not legally powerless to include the territories

annexed in the Elkhart Community Schools and the Supreme Court has held that these areas were placed in the Elkhart Community Schools under the 1966 plan of the County Committee and the State Commission.

(5) Since the area involved in Ordinance 2145 did not come into existence until after the notice and election of May 3, 1966, it is certainly contrary to law to say that such area went to the Elkhart Community Schools under the 1966 plan approved March 31, 1966. There is no notice in the record, and it certainly could not be assumed that the notice given would have included an area that was not even in the Civil City of Elkhart at the time of the notice and election.

In regard to grounds for new trial, that the court was in error in overruling and denying the plaintiff's motion to amend the complaint and for a hearing before the court on the complaint for declaratory judgment, in light of the Supreme Court's decision that Chapter 202 of the Acts of 1959 applied, the plaintiff will say in support of those grounds that they contain copies of the notice actually given with affidavits showing that none of the registered voters in the annexed areas involved in Ordinances numbered 2122, 2127, 2131 and 2145 were given any notice of the election, as the notice itself was directed only to the registered voters of Elkhart School City, Cleveland School Township, Osolo School Township and Washington School Township. The notice also discloses that no mention was made of Concord Community Schools or that it was proposed to be divided and no provision made for the disposition of liabilities of Concord Community Schools specifically, other than the Elkhart Community Schools was to assume the liabilities of all existing school corporations.

In connection with the motion for leave to amend and motion for a hearing, affidavits were filed showing that in the table showing assessed valuation of the proposed Elkhart Community Schools, the amount of the assessed valuation did not include any of the annexed areas involved in this matter, thus showing no intention on the part of the County Committee or the State Commission to include the annexed areas in the Elkhart Community Schools system and remove them from the Concord Community Schools.

The Memorandum attached to the Motion for Leave to Amend also contained an affidavit that the notice of the precincts and places of election did not include any of the area involved in the annexations, further showing that the registered voters in Concord Community Schools in the area involved were not given any notice of an election.

In regard to the grounds in the Motion for New Trial that the court was in error in overruling and denying plaintiff's motion to modify the judgment, the plaintiff would state that said motion specifically called to the court's attention the area involved in Ordinance No. 2145; that it was not in accordance with the findings of the Supreme Court, in that, the County Committee and the State Commission could not possibly have intended to include an area on March 31, 1966 which was not even in existence as a part of the Civil City of Elkhart and did not come into existence until after the special election of May 3, 1966.

CONCLUSION

In passing on a Motion for New Trial, under the law of Indiana, the lower court has a right and a duty to consider the evidence and determine whether or not his deci-

sion is sustained by sufficient evidence or whether it is contrary to law and the court has the power to grant a new trial.

The court also has the power under Rule 1-8 of the Supreme Court to re-open the case and permit additional evidence to be submitted and to re-state its finding and judgment. In the interest of justice, the court should reconsider the evidence in this case in the light of the Supreme Court decision that Chapter 202 of the Acts of 1959 is the controlling law of this case. It is obvious that the Supreme Court decided what law was applicable to this case and intended for the trial court to apply that law to the facts and the evidence to determine the intention of the County Committee and the State Commission in the 1966 plan for Elkhart Community Schools. Contained in the Memorandum in connection with plaintiff's Motion to Amend Complaint and for a hearing on the complaint for declaratory judgment are two Resolutions of the State Commission—one passed in June, 1966, and the other in November of 1967, both declaring that the State Commission had no intention to disturb Concord Community Schools as it was created on July 1, 1964 with its boundaries being all of Concord Township outside of the Civil City of Elkhart as the Civil City of Elkhart existed in 1964.

The court should grant a new trial, permit additional evidence, and then apply the law of Chapter 202 of the Acts of 1959 to this evidence and make the determination of the boundaries and the rights of Elkhart Community Schools and Concord Community Schools. If Elkhart Community Schools are not satisfied with the decision of the Court, it would have the right to petition the Supreme Court for redress claiming that the court's judgment is not in accordance with the Supreme Court deci-

sion. On the other hand, if no new trial is granted, Concord Community Schools would have the right to appeal to the Appellate Court and assign as error the court's overruling its motion for a new trial. In the meantime, the rights of the parties will not have been finally determined as to where the pupils in the disputed area will attend school, what tax rates shall be levied in the disputed area, which corporation will be entitled to the proceeds from taxes levied in the disputed area and which school corporation will have to pay the liabilities of Concord Community Schools.

Respectfully submitted,

KIZER AND NEU
By /s/ MARSHALL F. KIZER
Attorneys for Plaintiff

APPENDIX I

IN THE COURT OF APPEALS OF INDIANA

STATE OF INDIANA, ON THE RELATION) AND FOR THE USE OF CONCORD COMMUNITY SCHOOLS, ELKHART COUNTY, INDIANA,

Appellant

vs.

SCHOOL CITY OF ELKHART, INDIANA, THOMAS BLACKBURN, as President and Trustee of School City of Elkhart, Indiana; MARION SHELLEY, as Vice-President and Treasurer of School City of Elkhart, Indiana; JOHN BURT, as Secretary and Trustee of School City of Elkhart, Indiana; RALPH MILLER, as Treasurer and Trustee of School City of Elkhart, Indiana; PHILIP BYRON, as Trustee of School City of Elkhart, Indiana; JOE C. RICE, as Superintendent of School City of Elkhart, Indiana; CLARE F. GARBER, as Auditor of Elkhart County, Indiana; EVERETT L. DANIELSON, as Treasurer of Elkhart County, Indiana; CLEVELAND SCHOOL TOWNSHIP: OSOLO SCHOOL TOWNSHIP: WASHINGTON SCHOOL TOWNSHIP: ELKHART COMMUNITY SCHOOLS; LOUIS B. MILLER, ROBERT BOGER, ELWOOD BRANNAN, RICHARD DOUTLICK, NELSON C. EATON, CHARLES FIELDS, LA VERN HOSTETLER, ORVILLE MILLER, CLIFFORD SMITH, as members of and constituting the Elkhart County School Reorganization Committee; CUSTER BAKER CHESTER BIDDLE, J. WILLIAM CHAMBERS, JOHN J. DILLON, AMELIA COOK, DICK HELLER, JR., HERBERT C. HOLMES, WILLIAM E. WILSON, BRYCE BOTTOM, as members of and constituting the Indiana State Commission for the Reorganization of School Corporations,

Appellees.

CAUSE NO. 3-972 A 66

ASSIGNMENT OF ERRORS

THE ABOVE NAMED APPELLANTS, State of Indiana on the Relation and for the Use of Concord Community Schools, Elkhart County, Indiana, aver that there is manifest error in the proceedings and judgment in the above entitled cause wherein the State of Indiana on the Relation and for the Use of Concord Community Schools, Elkhart County, Indiana is the appellant and the School City of Elkhart, Indiana, et al are the appellees, in this, to wit:

1. The Court erred in overruling the Appellant's Motion for New Trial.

WHEREFORE, appellant prays that the judgment and proceedings be in all things reversed and that the appellants be granted a new trial and for such other relief as the appellants may be entitled to.

KIZER AND NEU
BY /s/ MARSHALL F. KIZER

Marshall F. Kizer
Attorneys for Appellants
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Plymouth, Indiana 46563

Tel. 219 936-2169

APPENDIX J

IN THE SUPREME COURT OF INDIANA

STATE OF INDIANA, ON THE RELATION AND FOR THE USE OF CONCORD COMMUNITY SCHOOLS, ELKHART COUNTY, INDIANA, *Appellant* (Plaintiff Below)	)	
vs.	)	CAUSE
ELKHART COMMUNITY SCHOOLS, et al., *Appellees* (Defendants Below)	)	No. 3-972 A 66

PETITION TO TRANSFER

APPELLANT petitions to transfer this cause to the Supreme Court and states:

1. That the Court of Appeals decided the case (dismissed the appeal) with a written opinion dated January 30, 1973.

2. That the decision of the Court of Appeals was against Appellant here seeking transfer.

3. That a petition for rehearing was filed with the Court of Appeals in time and that a rehearing was denied on March 1, 1973.

4. That the decision of the Court of Appeals is in error in that:

A. That the decision of the Court of Appeals contravenes a ruling precedent of the Supreme Court as stated in *School City of Elkhart v. State ex rel Concord Com-*

munity Schools (1967) 248 Ind. 411, 227, N. E. 2d 672; Rehearing Opinion 229 N. E. 2d 824 by dismissing the appeal wherein the Supreme Court directed further application of the law and the facts to be found.

B. That the Court of Appeals, by dismissing the appeal, failed to state in writing whether the trial court complied with Chapter 202 of the Acts of 1959 as it was directed to do by the Supreme Court in *School City of Elkhart v. State ex rel Concord Community Schools* (1967) 248 Ind. 411, 227 N. E. 2d 672.

C. That the Court of Appeals failed to state in writing the questions raised by the Motion to Modify the Judgment which was part of the Motion for New Trial submitted and appealed from. The dismissing of the appeal precluded all matters relative to the merits of the case.

D. That the Court of Appeals erroneously held that the Supreme Court was acting as a Court of original jurisdiction in the case of *School City of Elkhart v. State ex rel Concord Community Schools* (1967) 248 Ind. 411, 227 N. E. 2d 672 when the Constitution does not grant the Supreme Court such jurisdiction and when it cannot be presumed that the Supreme Court would erroneously assume jurisdiction, and that such holding raises a new question of law.

E. That the Court of Appeals, by dismissing the appeal, failed to give a written opinion on the Constitutional questions raised by Appellant relating to due process of law and more particularly:

(1) Failure to follow Chapter 202 of the Acts of 1959 setting out the legal method of restructuring school districts.

(2) Failure to give any notice directed to Appellant.

(3) Taking of property of Concord without notice and without providing for the assumption of the debts, obligations and liabilities secured by the property so taken.

WHEREFORE, the Appellants pray that the Supreme Court grant transfer of this cause and that the trial court be reversed and the Motion for New Trial be granted and for all other proper relief.

KIZER AND NEU
By /s/ RICHARD F. JOYCE

Attorneys for Appellant
309 E. Jefferson Street
Plymouth, Indiana 46563

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No. 73-725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

STATE OF INDIANA, ON THE RELATION AND FOR THE USE OF CONCORD COMMUNITY SCHOOLS, ELKHART COUNTY, INDIANA,

Petitioner,

v.

SCHOOL CITY OF ELKHART, INDIANA; ELKHART COMMUNITY SCHOOLS, *et al.*,

Respondents.

On Petition For Writ of Certiorari To the Supreme Court of Indiana

RESPONDENTS' BRIEF IN OPPOSITION

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December, 1973

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-725

STATE OF INDIANA, ON THE RELATION AND FOR THE USE OF CONCORD COMMUNITY SCHOOLS, ELKHART COUNTY, INDIANA,

Petitioner,

v.

SCHOOL CITY OF ELKHART, INDIANA; ELKHART COMMUNITY SCHOOLS, *et al.*,

Respondents.

On Petition For Writ of Certiorari To the Supreme Court of Indiana

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RESPONDENTS' BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether a school corporation was deprived of Fourteenth Amendment rights in connection with a boundary dispute finally resolved by the Supreme Court of Indiana in 1967.

STATEMENT

This litigation involves a dispute over which of two school corporations—Elkhart Community Schools or Concord Community Schools—has jurisdiction over four parcels of land annexed by the City of Elkhart, Indiana, in 1966. The land is situated in Concord Township, whose boundaries overlap the City of Elkhart. The validity of the annexations is not in dispute.[1]

Pursuant to the Indiana School Corporation Reorganization Act of 1959,[2] an election was held in May 1966 approving a reorganization consolidating the previously separate school corporations of the City of Elkhart and the townships of Cleveland, Osolo, and Washington into a single school corporation to be known as Elkhart Community Schools (hereafter referred to as "Elkhart"). The reorganization plan defined the boundaries of the new consolidated corporation to encompass "the Civil City of Elkhart" as well as the three townships. Pet. App., p. A-59. The boundaries of the adjacent Concord township school corporation (known as Concord Community Schools and hereafter referred to as "Concord") were defined in its previously approved reorganization plan to exclude all areas of Concord township lying within the city limits of Elkhart. Pet. App., p. A-29.

Immediately after the Elkhart reorganization election, Concord sued Elkhart and other defendants for injunctive and declaratory relief based on its contention that the four areas annexed by the City of Elk-

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[1] These annexations were strictly civil city legislative actions unrelated to any school corporation action.

[2] Burns' Ind. Stat. Ann. §§ 28-3501 et seq., 1971 IC 20-4-1 et seq.

hart in 1966 remained within Concord's jurisdiction for school purposes. Concord claimed that the approved reorganization could not encompass these annexed areas because the "Bodine Act" of 1963,[3] an Indiana statute specifying a method for transferring territory from one school corporation to another that had not been invoked in this case, established the exclusive method for changing school corporation boundaries in Indiana. Pet. App., p. A-56.

After hearing, the trial court granted Concord a temporary injunction. Elkhart appealed directly to the Supreme Court of Indiana. Both parties agreed, in accordance with substantial Indiana precedent, that the appeal should be submitted to the Supreme Court on the merits of the claims for final declaratory and injunctive relief, since all pertinent facts and authority had been thoroughly presented in the hearing below.[4] The Supreme Court of Indiana treated the case as so submitted and reversed the trial court with instructions to dissolve the temporary injunction

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[3] Burns' Ind. Stat. Ann. §§ 28-3601 et seq., 1971 IC 20-4-4-1 et seq.

[4] Concord's brief to the Supreme Court of Indiana (pp. 29-30) stated:

> "Concord joins with the appellants in their request that this matter be deemed submitted to this honorable court on the merits. We agree with the appellants that all the facts and all authority were presented below with respect to such temporary injunction which might hereafter be submitted in determining the issue as to a permanent injunction and declaratory relief. It is further agreed that the case below was fully briefed on the merits and will be fully briefed on the merits before this court. The interest of all involved parties together with the interest of the public necessitate an early disposition of this matter on the merits."

and to enter judgment for Elkhart. Pet. App., pp. A-2, A-5.[5]

In its opinion, issued June 20, 1967, the Indiana Supreme Court sustained the Elkhart school corporation reorganization under the 1959 Reorganization Act and concluded that the reorganized corporation properly encompassed the four disputed areas. Pet. App., p. A-1. Concord filed a petition for rehearing challenging the determination that the Elkhart reorganization had complied with the 1959 Reorganization Act. The Supreme Court denied the petition on October 6, 1967. Pet. App., p. A-17. Thereafter, Concord filed a motion to modify mandate, arguing that unless the Supreme Court of Indiana modified its mandate as requested by Concord, "the lower court will enter judgment declaring all of the annexed areas to become a part of the Elkhart Community Schools as a result of the 1966 proposal."[6] The motion was dismissed by the Supreme Court on November 22, 1967. Pet., p. 11.

When the matter was returned to the trial court for entry of judgment in accordance with the Supreme Court's opinion, Concord sought leave to amend its

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[5] The final sentence of the opinion of the Supreme Court of Indiana stated:

> "The judgment herein rendered by the trial court is hereby reversed, with instructions to dissolve the temporary injunction, and the court is hereby ordered to enter a finding and judgment for the Appellants, defendants below, in accordance with the tenor hereof, both on the equity and the law questions presented." Pet. App., p. A-5.

In Indiana the opinion of the Supreme Court also constitutes its judgment and mandate.

[6] Appellee brief on Motion to Modify Mandate of the Court, p. 19. And see Pet. App., pp. A-68-69.

complaint (Pet. App., p. A-73) and filed a motion for rehearing on the merits of its claim. Pet. App., p. A-77. The trial court denied these motions (Pet., p. 12) and on November 21, 1967, entered its findings and judgment "pursuant to the mandate of the Supreme Court of Indiana" in favor of Elkhart and against Concord. Pet. App., pp. A-79-80.

Shortly thereafter, Concord undertook a new strategy to obtain the disputed land. It submitted to the State Commission for the Reorganization of School Corporations a new proposal for reorganizing the Concord schools to include the four disputed areas. The State Commission approved the Concord plan, but in response to a complaint by Elkhart the circuit court for Kosciusko County declared the plan invalid on the ground, *inter alia,* that its effect was to circumvent the 1967 decision of the Indiana Supreme Court. Pet. App., p. A-41. The Court of Appeals reversed (Pet. App., p. A-28), but on July 20, 1971, the Supreme Court of Indiana reversed the Court of Appeals and affirmed the circuit court, holding that the action of the Commission was an improper effort to nullify the Supreme Court's earlier decision. Pet. App., p. A-39. The court stated that:

> "It was the decision of this Court in that case that a certain disputed territory was within the boundary of the school district of Elkhart, and this Court ordered the trial court to enter final judgment accordingly." Pet. App., p. A-40.

Following the entry of final judgment by the trial court in the original litigation on November 21, 1967, in accordance with the 1967 Supreme Court decisio (pp. 4-5, *supra*) (and after Concord had submitted its second reorganization plan to the State Commis-

sion (p. 5, *supra*)), Concord had filed on December 19, 1967, a "Motion for New Trial." Pet. App., p. A-90. No action was taken on this motion for over four years until June 6, 1972 (almost one year after the second decision of the Indiana Supreme Court) when Concord requested that the motion be set for argument. R. 220, 227. On July 11, 1972, the trial court denied the motion. Pet., p. 13. The Court of Appeals dismissed an appeal by Concord from that ruling, holding that

> "the entire subject matter of this litigation has been completely decided, determined, and adjudicated in the prior appeal of this same case. In our opinion the Supreme Court has firmly closed the door on any further litigation between these parties on the same subject matter . . . ." Pet. App., pp. A-23-4.[7]

A petition by Concord to transfer the case to the Supreme Court of Indiana was denied on August 6, 1973. Pet App., p. A-25. The petition to transfer listed among the alleged errors of the Court of Appeals its failure "to give a written opinion on the Constitutional question raised by Appellant relating to due process of law." Pet. App., p. A-108. In its brief to the Court of Appeals, Concord had contended that there was a lack of "due process" as the result of the non-compliance with certain procedural requirements of the 1959 Reorganization Act in connection with the reorganization of the Elkhart schools. At no prior stage in the litigation, and in particular at no stage in the litigation culminating in the first

[7] The main thrust of Concord's argument in the Court of Appeals was that the Supreme Court of Indiana had no jurisdiction in the first appeal to render a final decision on the merits, even though the parties had agreed and urged that it do so. Pet. App., p. A-23.

decision of the Supreme Court of Indiana in 1967 finally determining the validity and effect of the Elkhart school reorganization, did Concord in any manner raise any claim of violation of "due process" or of any provision of the federal Constitution.

On November 2, 1973, Concord filed a petition for a writ of certiorari to the Supreme Court of Indiana raising a series of questions concerning the validity of the 1967 decision of that court. Pet., p. 3.

REASONS FOR DENYING THE WRIT

Among the many grounds for denying certiorari in this case are the following: (1) the petition is untimely by several years; (2) the federal constitutional questions raised in the petition were never properly presented to the Indiana courts; (3) the decision to be reviewed rests on an adequate independent state ground; and (4) petitioner, a government entity created by the state, cannot assert Fourteenth Amendment constitutional rights against the state.

1. Although the petition ostensibly asks for certiorari to review the 1973 Indiana Supreme Court order denying transfer from the Court of Appeals,[8] its real purpose, as demonstrated by its "Questions Presented," is to review the 1967 Indiana Supreme Court decision. Since that decision became final within the meaning of 28 U.S.C. § 1257 upon the denial of rehearing on October 6, 1967 (*Chicago G.W.R. Co.* v. *Basham,* 249 U.S. 164 (1919)), the petition asking review of that decision is nearly six years out of time

[8] Concord should have requested a writ to the Court of Appeals, the court which rendered the last decision in the proceedings below. See Callender v. Florida, 380 U.S. 519 (1965) and 383 U.S. 270 (1966).

(see 28 U.S.C. § 2101(c)), and must be dismissed as untimely.

The fact that the Indiana Supreme Court's 1967 decision remanded the proceeding to the trial court for the entry of final judgment did not have the effect of extending the time for seeking Supreme Court review, since the remand left nothing for the trial court save the ministerial act of entering judgment. *Cole* v. *Violette,* 319 U.S. 581 (1943); *Department of Banking* v. *Pink,* 317 U.S. 264 (1942).

Relying on certain language in the opinion of the Supreme Court of Indiana on rehearing, Concord argues that the order denying rehearing "could easily be interpreted to require the trial court to apply the 1959 Act to the facts presented by the parties on reversal"—in other words, to conduct a trial on the merits. Pet., pp. 15-16. The argument is foreclosed by the repeated rulings of the Indiana courts (pp. 5-6, *supra*) that the 1967 Indiana Supreme Court decision was not subject to further review by a state court. See *Department of Banking* v. *Pink, supra* at p. 268. Concord so conceded in its motion to modify the Supreme Court's mandate submitted after its petition for rehearing had been denied (p. 4, *supra*). Concord's subsequent change of position, in the face of its prior concession and of its explicit plea to the Supreme Court to decide the case finally on the merits in 1967 (p. 3, *supra*), cannot disturb the finality of the 1967 Indiana Supreme Court decision.[9]

[9] Concord's virtual abandonment of this litigation following the entry of judgment by the trial court on remand from the Indiana Supreme Court, and its pursuit instead of an alternate strategy for securing the disputed territories, further demonstrates Concord's recognition that it had reached the end of the line in this litigation with the entry of the final judgment in November 1967.

2. From the outset of this litigation Concord argued that the Elkhart school corporation reorganization had failed of compliance with various features of the 1959 Reorganization Act. Yet it never based its arguments on constitutional grounds until its appeal to the Court of Appeals in 1972 from the trial court's denial of a new trial motion.[10] Neither the complaint, the appellate briefs in the first appeal round, the papers filed in the Indiana Supreme Court seeking rehearing or modification of mandate, nor the pleadings subsequently filed in the trial court even mentioned the federal constitution and none advanced any federal constitutional contention.

This court's jurisdiction to review state judgments on certiorari, insofar as relevant here, is confined to cases where rights are "specially set up or claimed under the [federal] Constitution." 28 U.S.C. § 1257 (3). The Court has repeatedly construed this statute as limiting its jurisdiction to those cases where the federal question has been properly raised in the first instance and preserved in the state courts. *E.g., Street* v. *New York,* 394 U.S. 576, 581-82 (1969). Since Concord failed even to raise a constitutional question at any point prior to final judgment in the litigation below, it cannot demonstrate, as required by the rules of this Court (Rule 23(f)), that the federal question was timely and properly raised and preserved.

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[10] Concord states that the trial court's denial of its motion to amend complaint and its entry of final judgment for Elkhart in November 1967 "necessarily decided" the federal constitution "due process questions." Pet., p. 16. However, the motion to amend complaint neither raised nor referred to any constitutional questions. Pet. App., p. A-73.

Moreover, Concord's briefs to the Court of Appeals in 1972 and to the Supreme Court in support of its motion to transfer in 1973 made only passing reference to the Fourteenth Amendment to the United States Constitution and to "due process" without citing any cases from this Court or otherwise setting up a federal constitutional argument. These slight allusions, apart from being woefully tardy, do not qualify as "distinct and positive" assertions of federal constitutional claims required to invoke this Court's jurisdiction. *Oxley Stave Co.* v. *Butler County,* 166 U.S. 648, 655 (1897); *DeBacker* v. *Brainard,* 396 U.S. 28, 32 (1969).

3. In addition to the foregoing infirmities, Supreme Court review is foreclosed because the only decision subject to review (the 1973 decision of the Court of Appeals) rests on an adequate and independent state ground. In its appeal to the Court of Appeals, Concord faced the threshold necessity of demonstrating that the 1967 determination of the issues by the Supreme Court of Indiana was not final and could be attacked. It argued that the Supreme Court lacked jurisdiction to decide the merits of the dispute (even though both parties had urged the Court to do so and agreed that it could. P. 3, *supra*). The Court of Appeals rejected Concord's argument, held that the 1967 Supreme Court decision had constituted a final determination of the dispute, and accordingly dismissed the appeal. This holding, in addition to confirming the finality of the 1967 Supreme Court decision within the meaning of 28 U.S.C. § 1257, precluded Concord under state law from rearguing the merits of the dispute and foreclosed its belated effort to raise constitutional questions. This ruling was an

independent and adequate basis under state law for dismissing Concord's appeal.

The Court of Appeals' reliance on this state ground did not improperly prevent Concord from raising federal issues in its dispute with Elkhart.[11] To the extent that Concord's federal contentions are founded on the failure to comply with the procedures of the 1959 Reorganization Act, these could and should have been raised at the outset of the litigation. Concord now appears to contend in addition that a deprivation of federal rights occurred when the Supreme Court of Indiana issued its opinion in 1967. If this is meant to question the court's decision of the merits on appeal from the entry of a temporary injunction, Concord's consent to that action precludes a later constitutional challenge. If the argument is meant to be that the court's decision was on unanticipated grounds, Concord could and should have raised any constitutional question thus presented in its petition for rehearing. See *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 281 U.S. 673, 677-78 (1930).

4. Apart from the foregoing grounds for dismissal of the petition for writ of certiorari, the petition should be denied on the ground, among many others, that Concord cannot set up a Fourteenth Amendment claim since it is an organ of the state wholly dependent upon the state for its existence and

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[11] Where, as here, the state court fails to pass on a federal question (assuming such a question was advanced below) this Court presumes "the omission was due to want of proper presentation in the state courts" absent a contrary showing by petitioner. Street v. New York, 394 U.S. 576, 582 (1969). No such showing has been made here.

powers[12] and is thus without capacity to complain under the Fourteenth Amendment of adverse state action.[13] *E.g., Williams* v. *Mayor & City Council,* 289 U.S. 36, 40 (1933); *Hunter* v. *City of Pittsburgh,* 207 U.S. 161, 178-79 (1907); *Attorney General ex rel. Kies* v. *Lowrey,* 199 U.S. 233 (1905). Moreover, given the "vast leeway"[14] afforded to the states in the decisions of this Court involving alteration of municipal boundaries, at least where, as here, there are no overtones of racial discrimination, a mere alleged failure to comply with procedural requirements of state laws governing school boundary revisions cannot be projected into federal constitutional violations. *Hunter* v. *City of Pittsburgh,* 207 U.S. 161, 179 (1907); *Gomillion* v. *Lightfoot,* 364 U.S. 339, 343 (1960); *Adams* v. *City of Colorado Springs,* 308 F. Supp. 1397, 1403 (D. Colo.) (three-judge court), *aff'd,* 399 U.S. 901 (1970).

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[12] State ex rel. Harris v. Mutschler, 232 Ind. 580, 115 N.E.2d 206, 210 n.1 (1953). The powers of school corporations in Indiana are specified by statute. Indiana General School Powers Act, Burns' Ind. Stat. Ann. §§ 28-1701 et seq., 1971 IC 20-5-1 et seq.

[13] This case was brought in the name of the State of Indiana as was the petition to this Court.

[14] Sailors v. Board of Educ., 387 U.S. 105, 109 (1967).

CONCLUSION

The petition for writ of certiorari should be dismissed or denied.

Respectfully submitted,

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